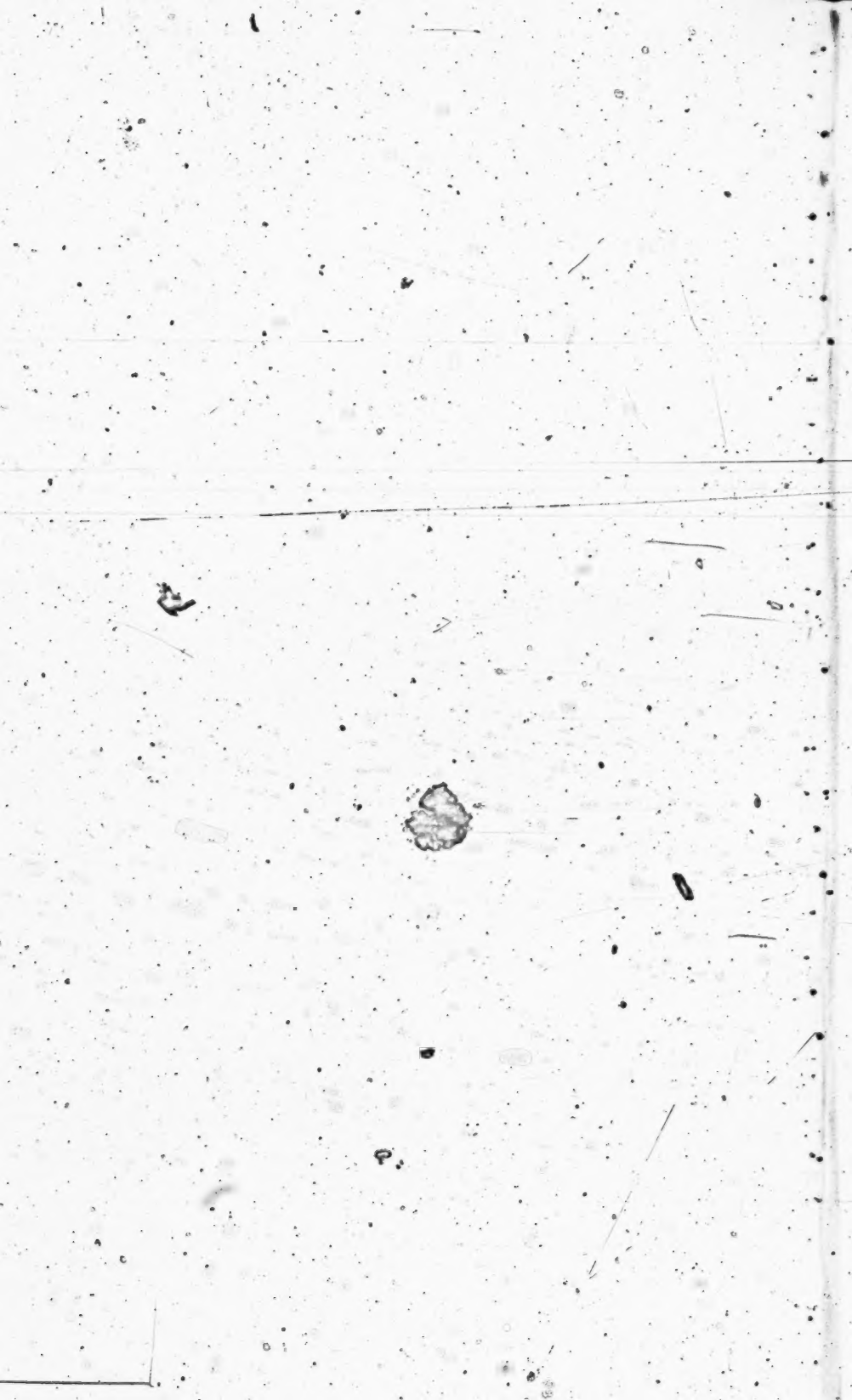

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

No. 10

SCHINE CHAIN THEATRES, INC., *et al.*,
*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

## BRIEF FOR APPELLANTS

WILLARD S. McKAY,
*Attorney for Appellants.*

BRUCE BROMLEY,
ALFRED McCORMACK,
RICHARD T. DAVIS,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

| | |
|---|---|
| SCHINE CHAIN THEATRES, INC., *et al.*, *Appellants*, *vs.* THE UNITED STATES OF AMERICA. | No. 10 |

## BRIEF FOR APPELLANTS

The opinion of the District Court is reported at 63 F. Supp. 229.

### Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272, 15 U. S. C. § 29), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

*U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173;

*U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707;

*Interstate Circuit* v. *U. S.*, 306 U. S. 208;
*Paramount Famous Corp.* v. *U. S.*, 282 U. S. 30;
*United States* v. *Reading Co.*, 226 U. S. 324;
*United States* v. *American Tobacco Co.*, 221 U. S. 106.

## Questions Presented

This is an appeal from an Amended Judgment (hereinafter referred to as "the judgment") entered March 29, 1946, by the District Court for the Western District of New York, and from a Final Order of that Court, entitled "Order Setting Forth Plan Effectuating Judgment" entered July 5, 1946, in a civil action under the Sherman Act. The questions presented are:

1. Whether the provisions of said Final Order (hereinafter referred to as "the order of divestiture") and the provision of the judgment pursuant to which the order of divestiture was made, were necessary and appropriate or, as appellants contend, were improvident and an abuse of discretion by the District Court.

2. Whether, by reason of certain erroneous rulings with respect to the findings and the admission and effect of evidence, the findings and judgment may be sustained or whether, as appellants contend, the findings and judgments are vitiated by such erroneous rulings.

3. Whether the findings of the District Court are supported by the evidence and are sufficient to support the judgment.

4. Whether the injunctive provisions of the judgment and the order of divestiture may be sustained or whether, as appellants contend, such provisions violate Section 19 of the Clayton Act and Rule 65(d) of the Rules of Civil Procedure, are invalid for indefiniteness and are in excess of any appropriate remedy, in addition to being unwarranted by the findings below or by the evidence.

## Statutes Involved

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. §§ 1, 2, 4):

> "§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty
>
> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *"
>
> "§ 2. Monopolizing trade a misdemeanor; penalty
>
> "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."
>
> "§ 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; * * *"

## Statement of the Case

The appellants, who are all the defendants named in the second amended complaint (R. 39-57), on which the case was tried, are a single business entity or interest, operators of a so-called "chain" of motion picture theatres. They comprise (1) Schine Chain Theatres, Inc., (2) its officers and directors, J. Myer Schine, Louis W. Schine and John A. May, and (3) five other corporations which are wholly-owned subsidiaries of Schine Chain Theatres, Inc. They are referred to collectively as "Schine".

The lower Court's findings were in terms "limited to acts committed or course of conduct pursued prior to May 19, 1942, plaintiff's counsel having stated at the opening of the trial that he would not offer any evidence beyond that date" (Finding 30, R. 3225). May 19, 1942, was the date of a consent order entered below in connection with a 2-year postponement of the trial (R. 256-63). It is the last date as of which the record speaks, and the statistical information hereinafter set forth presents the situation as of that date.

The theatres which comprised the Schine Circuit as of May 19, 1942, were distributed geographically as follows:

78 theatres in 41 towns in New York
36 theatres in 17 towns in Ohio
18 theatres in 8 towns in Kentucky
12 theatres in 7 towns in Maryland
2 theatres in 2 towns in Delaware
2 theatres in 1 town in Virginia

or a total of 148 theatres in 76 towns, scattered over 6 States.* Of these theatres, 22 were marginal or submar-

*Not including 10 theatres in New York, 6 in Ohio and 2 in Kentucky which had been permanently closed and either had been or were to be converted to commercial use.

ginal theatres that were ordinarily kept closed, or were closed during the summer or other slack seasons, or were kept open only for week-ends or at particular seasons (R. 223-45).

As of May 19, 1942, the Schine Circuit consisted of

(a) 125 theatres located in small cities and towns, with populations ranging from 5,000 to 35,000, of which towns 21 had only one theatre and only 6* had more than 3 theatres;

(b) 11 neighborhood theatres in Rochester and 2 in Buffalo, N. Y.;

(c) 6 theatres in Lexington, Ky.; and

(d) 6 theatres in Syracuse, N. Y., in which Schine was jointly interested with RKO, which Schine managed, but for which RKO bought the pictures (Ex. 1004, R. 4415, 2982; Ex. 1005, R. 4422, 2982).

In addition, Schine was buying and booking films for a summer-resort theatre in Sacandaga Park, N. Y. (R. 247).

## Background of the Case

This case is one of a series of civil actions under the Sherman Act against units in the motion picture industry, of which cases two others—*United States* v. *Paramount Pictures*, 66 F. Supp. 323, 70 F. Supp. 53, and *United States* v. *Griffith Amusement Co.*, 68 F. Supp. 180, are on the docket of this Court for the present term. Another of the same series of cases was decided in December, 1944, *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173.

---

*Auburn, Corning, Glens Falls and Watertown, N. Y.; and Cumberland and Salisbury, Md.

The *Paramount* case is the principal case of the series, dealing as it does with the major producer-distributor-exhibitor units in the industry. The present case and the *Griffith* case deal, and the *Crescent* case dealt, with relatively small independent units in the exhibition branch of the industry. The 148 theatres which Schine was operating in May, 1942, compare with some 17,000 motion picture theatres in the United States,* of which one-sixth, including most of the important metropolitan theatres, are controlled by the 5 theatre-owning producer-distributors,** who are defendants in the *Paramount* case (66 F. Supp. at 353).

When the complaint in the *Paramount* case was filed in July, 1938, the Department of Justice explained in a press release that its principal purpose was to break up the producer-exhibitor combinations by requiring the large units in the industry to dispose of their theatres.*** The

---

*R. 2790. See also T. N. E. C. Monograph No. 43, "The Motion Picture Industry—A Pattern of Control."

**For brevity, the 8 large distributors of motion pictures (who were originally defendants in this case) will be referred to in this brief, as in the Trial Court's findings (R. 3214), by the characteristic parts of their respective names, i.e., Fox (sometimes called Twentieth Century-Fox), Loew's (sometimes called Metro or MGM), Paramount, RKO and Warner, the 5 "majors" which produce and distribute pictures and also operate theatres, and Columbia, Universal and United Artists, the 3 large distributors which do not operate theatres. The 5 large producer-distributor-exhibitors are ordinarily called the "majors", and are so referred to in the *Paramount* case. To avoid confusion, therefore, it is to be noted that the Court below in its findings has referred to all 8 companies as the "major film companies" (R. 3214) and to their product as "major film product" (R. 3213).

***Department of Justice Press Release of July 20, 1938, announcing the commencement of the *Paramount* action. New York Times, July 21, 1938, p. 6, col. 1.

conditions in the industry to be cured by such measures were later summarized by the Department as follows:

> "(1) Independently owned theatres are being driven out of business; (2) The construction and operation of new theatres is handicapped because any new enterprise is subject to the arbitrary control of a presently existing monopoly; (3) New or independent enterprise in the production of pictures is handicapped in the same way because the existing combination substantially controls the most important theatre outlets on a Nation-wide scale; (4) Independently owned theatres are so narrowly limited in the choice of films that they cannot by competition and experimentation suit the particular tastes of their communities."*

On April 28, 1939, the Government started its first case against an independent chain of theatres (the *Griffith* case). The Department press release explaining its purpose** said that the *Griffith* case was "an essential complement to the pending equity suit in New York" (the *Paramount* case), since the objectives of the Department in the *Paramount* case could not be attained

> "* * * so long as there exist chains of theatres exercising monopoly power in various sections of the country, even if the affiliation between such chains and the major companies is broken. If the major producers are deprived of control over local theatres,

---

*Department of Justice Press Release of April 28, 1939, announcing the commencement of the *Griffith* case; reported in New York Times, April 28, 1939, p. 38, col. 1.

**Ibid.

they must have for themselves a competitive market of truly independent theatres in which to distribute their product. * * * To leave the chain theatres in control of the market after divestiture by the major companies would be simply to substitute a number of local monopolies for the national monopoly which is now charged to exist. * * * Local monopoly control may be quite as effective in stifling competition as national monopoly control and at the same time be more disorderly.

* * * * * * * * *

"This proceeding, aimed against local monopolies, has the same general purpose as the suit in New York which is aimed against national monopoly. These theatres are able to make blanket contracts for all the desirable pictures without competing with local independent exhibitors.

* * * * * * * * *

"In fairness to the defendants in this particular proceeding, it should be added that there are many other chains of theatres in the United States whose situation is similar. The first proceeding is brought against these particular defendants only because the investigation involving them happened to be completed first."*

The complaint in the present case, which follows closely the pattern established in the *Griffith* case, was filed on August 7, 1939 (R. 1-20).

The defendants named in the original complaint, in addition to appellants, were the 5 major producer-distributor companies and the other 3 large distributors (R. 1, 3-5).

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*Department of Justice Press Release of April 28, 1939.

**Violations Charged in the Complaint**

The complaint charged the defendants with violating Sections 1 and 2 of the Sherman Act by combining and conspiring with each other to restrain interstate commerce in motion pictures in practically all situations where Schine operated theatres, and by attempting to monopolize, by monopolizing, and by combining and conspiring with each other to monopolize, the first and preferred run exhibition of motion pictures in practically all such situations (R. 10).

More specifically it was charged that the distributors (a) in practically every such situation uniformly gave Schine the first and preferred run of motion pictures in preference to all competing theatres and with protection over such theatres; (b) refused to license motion pictures on a local competitive basis to competitors in Schine towns; (c) uniformly granted Schine privileges, benefits and advantages not generally granted to other exhibitors; (d) in many instances uniformly refused to sell second or subsequent runs of pictures in opposition to a Schine theatre; (e) uniformly granted unreasonable protection to Schine over other theatres; (f) in many instances charged Schine lower rental for pictures than they charged other exhibitors for comparable or less favorable runs, and (g) on many occasions licensed to Schine motion pictures greatly in excess of its reasonable requirements, thus preventing other exhibitors from getting the pictures at all or from getting them while still new (R. 11-12).

The complaint also alleged that Schine, having a large number of theatres, possessed large "circuit buying power", which it used to induce the distributors to grant privileges to Schine theatres and impose restrictions on competing

theatres; that because Schine had the only theatre or theatres in operation in many towns (i.e., "closed towns") it was able to use such local "monopolies" to negotiate favorable terms for pictures in towns where there was competition (i.e., "open towns") (R. 12-13).

The complaint further alleged that Schine had acquired and attempted to acquire theatres, and had forced or attempted to force competitors out of business, by the following methods, in cases where the competitor would not sell out to Schine: (1) threatening to build an opposition theatre, (2) building an opposition theatre, taking product away from the competitor and relegating him to an inferior position, (3) threatening to deprive competitors of desirable product or run, (4) depriving another exhibitor of desirable product, thereby relegating him to an inferior position, (5) announcing the proposed construction or opening of a theatre, (6) acquiring superior title in another exhibitor's theatre and taking over its operation, (7) cutting admission prices in competitive situations, (8) resorting to unusual and costly games and give-aways in such situations and (9) taking unreasonable protection over competing theatres (R. 13-14).

It was further alleged that Schine had restrained trade and monopolized the exhibition of motion pictures in the Schine towns by (1) monopolizing first and preferred runs, (2) contracting for more feature pictures than it could reasonably exhibit, (3) demanding and receiving unreasonable protection over competitors, (4) demanding and receiving more favorable rental terms than other exhibitors, (5) demanding and receiving more favorable rejection privileges than other exhibitors and (6) inducing such privileges from the distributors by entertainment, gifts and favors to their representatives (R. 14-15).

It was further alleged that Schine, in order to perpetuate its monopoly and discourage competition, had engaged in certain practices designed to prevent others from opening competing theatres by (1) opening or announcing the opening of closed theatres; (2) keeping or acquiring theatre sites and announcing the proposed construction of a theatre; (3) communicating with distributors and reserving feature pictures and runs that might otherwise be available to another exhibitor who intended to open a theatre in a Schine town and (4) interfering with arrangements being negotiated by other exhibitors designed to bring competition into a Schine town (R. 15).

The allegations of the original complaint were substantially repeated in the second amended complaint, upon which the case was tried (R. 39-57). The appellants, by their answers to the three successive complaints, denied each and every conclusional allegation of wrongdoing and each and every allegation of fact in support thereof (R. 58-66).

Upon the verified complaint and certain affidavits the Government moved on January 17, 1940, for a preliminary injunction restraining Schine from acquiring or operating additional theatres and from opening, during the pendency of the suit, any of their theatres which were then closed. That motion the Court denied (31 F. Supp. 270) "upon the condition, however, that it may be renewed upon a showing that the Schine defendants have acquired or are about to acquire additional theatres or have opened or are about to open any closed theatres under circumstances showing intimidation, threats or coercive tactics directed to any competitor or prospective competitor" (*Id.* at 276). The Government did not renew the motion, although Schine acquired 16 additional theatres between the date of denial

of the motion and the date of the consent order entered herein.

**Consent Order**

The case was called for trial in May, 1942. Meanwhile, on November 20, 1940, a consent decree had been entered in the *Paramount* case which (a) in effect postponed for three years the issue of whether the Government would prosecute its case against the larger companies to compel divestiture of their theatres and (b) gave the industry an opportunity to set up a scheme of self-government and arbitration which would eliminate the trade practices that the Government considered to be, in their total effect, violative of the Sherman Act. See *United States* v. *Paramount Pictures*, 66 F. Supp. at 331-3.

As a result of the *Paramount* consent decree, the 5 major companies which had accepted that decree were dismissed as defendants in the present case, by agreement between them and the Government. The other 3 distributors were dismissed a few days before the trial, again by agreement with the Government and over objection by appellants, leaving appellants as the only defendants in the case.

When the case came on for trial, it was adjourned to May, 1944, by stipulation, upon entry of a temporary order, hereinafter referred to as the "consent order" (R. 256-63), by the terms of which Schine agreed (a) to refrain from two specific trade practices to which the Government objected and (b) to endeavor to dispose of those theatres which it had acquired since the commencement of the action, so as to reestablish the status quo at the date of the action.

In agreeing to the consent order, so as to avoid going to trial during the critical period of the war, counsel for Schine made the following statement (R. 267):

> "The defendants in this case, the exhibitor defendants, have consented to the entry of this order and they are motivated very largely by consideration of the fact that under the conditions as they exist now the time of this Court, the time of Government attorneys and the time of their own attorneys and their executives should not be taken up for a period which we estimate at six months in the trial of this case.
>
> "For that reason we have made what we consider very substantial sacrifices, and for that reason we have consented, subject to your Honor's approval, to the entry of this order."

The statement has been quoted to emphasize that Schine *in fact* consented to the conditions which the Government insisted on, because, when the case actually came to trial, both the Government and the Court persisted in treating the consent order as if it had been imposed upon Schine for wrongdoing.

The trade practices which the consent order enjoined were (a) the making or continuing of so-called "franchise" agreements with distributors, and (b) the inclusion of both "closed" and "open" towns in the same contract for pictures.

***Franchises***

A "franchise" is one of the methods of buying and selling* pictures for exhibition in theatres. As correctly defined in the *Paramount* case (66 F. Supp. at 333), a franchise is

---

*The term "buying and selling pictures" and similar terminology are used for convenience of expression to describe the contracts between exhibitors and distributors for the licensing of rights to exhibit pictures under copyright.

> "A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of the agreement."

The consent decree in the *Paramount* case had enjoined the major distributors from making any new franchise agreements. The consent order in the present case went further, in that all existing franchises between Schine and distributors were declared void (R. 260); and Schine has not had a franchise from any distributor since 1942.

***Closed towns not to be combined with open towns in buying of pictures***

Under the consent order Schine agreed to refrain from combining "closed" towns with "open" towns in the purchase of pictures (R. 260-61). The Government contended that Schine's "buying power" for "closed" towns gave it an unduly advantageous bargaining position for pictures in "open" towns.

***Restoration and maintenance of status quo***

Between the filing of the complaint and the date of the consent order, Schine had acquired interests in 16 additional theatres in 13 scattered towns in New York, Maryland, Ohio, Kentucky, Delaware and Virginia (R. 257-58). Under the consent order Schine agreed to offer, to the former owner or last operator of each such theatre, the opportunity to reacquire the same for the amount of Schine's capital investment therein, and, if such offer were not

accepted, then to make the same offer generally to "independent exhibitors". (R. 258-59). The consent order also provided that Schine should not acquire any additional theatre or interest therein without first satisfying the Court that such acquisition would not be against the public interest, after giving due consideration to the competitive situation, if any (R. 260).

The consent order was extended to November 15, 1944 (R. 426, para. (3)), at which time it expired by its own terms (R. 256, para. II). By that time Schine had disposed of 11 of the 16 theatres named in that order (R. 2988-89).

## The Trial

The case came to trial on May 31, 1944, before Judge John Knight of the United States District Court for the Western District of New York.

The Government's evidence, in spite of the allegations of the complaint that Schine had violated the Sherman Act "in practically all situations" where Schine operated theatres (76 towns in all), related to only 32 towns. For the remaining 44 towns the Government put in no evidence on what Schine did or did not do in such towns.

With respect to some of the allegations of the complaint—*e.g.*, that Schine had restrained trade by contracting for more pictures than it could reasonably exhibit and by inducing privileges from distributors by entertainment, gifts and by favors to their representatives—the Government introduced no evidence. On some issues the Government put in no evidence except inter-office memoranda taken from the files of the distributors and representing hearsay of the most extreme character.

With respect to the 32 towns about which at least some evidence was introduced, the Government's evidence included oral testimony by a number of competing exhibitors and others, testimony concerning the size of appellants' theatre operations and the history of their acquisitions of theatres, and contracts entered into by Schine with the distributors. A very large part of the evidence, however, consisted of (a) testimony of other exhibitors concerning their conversations with employees of distributors and contracts entered into by them with the distributors; and (b) inter-office memoranda between employees of the distributors.

Appellants objected strenuously to the admission in evidence of those inter-office memoranda and conversations by exhibitors other than Schine with employees of the distributors,* and urged that such writings and conversations were not binding on them, and that, since such declarations constituted the *only* matter tending even remotely to establish the existence of any conspiracy, they were not admissible over the objection of appellants, who were not present when they were made. Appellants further urged that such communications should in no event be received as proof of the statements contained therein. The Trial Court, however, admitted the declarations subject to their being stricken if not connected (R. 618). Although never connected, practically all were retained in evidence in spite of appellants' later motion to strike them from the record (R. 2594); and, as will be shown in the Argument, these inadmissible declarations constitute the only support for many of the Court's findings (R. 3212-28).

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*R. 615-24; 2250-52; 2327-42; 2412-21; 2422-23.

The trial was concluded on November 10, 1944. The Government submitted its brief on December 26, 1944, giving its version of the evidence and asking for injunctive relief and "the sale of specific theatres in each town where the defendants were shown to have eliminated previously existing independent competition to the end that such competition may be restored".* Appellants filed their requests for findings and brief on January 24, 1945, and asked that the complaint be dismissed (R. 2990-3065).

On October 8, 1945, Judge Knight handed down his opinion, in which he found each and all of the appellants to have violated Sections 1 and 2 of the Sherman Act (R. 3067-89).

On November 1, 1945, the Court entered its judgment and filed its findings of fact and conclusions of law. The same had been submitted by the Government and were signed without change by Judge Knight. Section I of the judgment adjudged each of the appellants to have violated Sections 1 and 2 of the Sherman Act. Section II enjoined each of the appellants in specified respects. Section III ordered that appellants and their affiliated corporations be dissolved, realigned, or reorganized, and directed the submission of plans therefor (R. 3107-09).

On November 10, 1945, appellants filed a motion pursuant to Rule 52(b) of the Rules of Civil Procedure to amend and supplement the Court's findings of fact and conclusions of law and to amend the judgment accordingly (R. 3109-41). At the Government's request, hearing of that motion was postponed until February 4, 1946, and on that day the Government filed its motion to amend the findings of fact, conclusions of law and judgment (R. 3141-45).

*Pl. Br., Point III, C.

In framing their proposed amendments to the Court's findings (R. 3110-29), appellants attempted to preserve the language of the original findings to the extent that there was any evidence to support them, changing the language no more than appeared absolutely necessary to conform to the proof. Such proposed amended findings therefore represent what appellants regard as a statement of the maximum that the Court could have found on each of the subjects with which its findings deal. The additional findings proposed by appellants (R. 3130-40) were believed to be necessary for a true understanding of the case, and are based entirely upon the Government's formal admissions and uncontradicted testimony.

It is significant, therefore, that the Court stated that if it were to accept the appellants' findings it would have to reverse the judgment (R. 3207).

On March 8, 1946, Judge Knight handed down his opinion and decision granting appellants' motion to amend the findings only in a few and least material respects, and the Government's motion in practically all respects (R. 3207-11. The Court stated in the opinion:

> "The Findings made by the court follow closely the opinion. It is usually the practice of this court to ask the prevailing party to submit Findings. No need has been seen for asking an unsuccessful party to submit Findings. The latter has the opportunity to present the record on appeal" (R. 3207).

On March 29, 1946, the Court filed its amended findings of fact and conclusions of law (R. 3212-28) and also an amended judgment (R. 3228-30). The original judgment was amended by amplification of the injunctive pro-

visions and elimination of the direction for submission of plans for dissolution, realignment or reorganization.

On February 25, 1946, the Government had filed its "Plan of Reorganization of the Schine Circuit." (R. 3231-36; 3236-43). Therein the Government abandoned its request for the sale of specific theatres "in each town where the defendants were shown to have eliminated previously existing independent competition" (Pl. Br., Pt. III C) and asked for an entirely different scheme of relief. It proposed that all but 40 of appellants' 133 theatres* be sold by a trustee to be appointed by the Court and that the injunctive provisions of the judgment should be enlarged by forbidding each of the appellants (a) from buying or booking pictures for any theatre in which it or he does not have a financial interest and (b) from acquiring any financial interest in any additional theatre except upon an affirmative showing that such acquisition would not unreasonably restrain competition (R. 3243).

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*The number of theatres was reduced from 148 to 133 between May 19, 1942, and February 25, 1946, by the following transactions:

A. Schine disposed of 11 theatres pursuant to the consent order—2 in Bowling Green, O., 2 in Appalachia, Va., and 1 in each of the following 7 towns: Clifton Springs, Glens Falls, Rochester and Scotia, N. Y.; Mt. Vernon, O.; and Corbin and Pikeville, Ky.

B. Schine acquired an additional theatre in Cumberland, Md., with the Government's consent and approval of the Court (R. 425-26).

C. 5 theatres not named in the consent order are no longer held by Schine, *i.e.*, 1 in each of the following towns: Oneonta, Oswego and Syracuse, N. Y.; Bellefontaine, O., and Salisbury, Md.

On April 1, 1946, appellants filed their objections to the Government's plan (R. 3243-3311), pointing out that, even assuming the validity of the Court's findings and conclusions, there was no reason for the drastic and unprecedented relief sought by the Government. The trial of the *Paramount* case was then in progress and it was pointed out to Judge Knight that Judge A. N. Hand, presiding over the Statutory Court in that case, had indicated that the Court was not disposed to divest the major producer-distributor-exhibitors of their far more extensive theatre holdings (R. 3244-45).

Appellants also protested vigorously against the propriety of ordering the sale of their property by a trustee (R. 3298-99). They asked that the Government's plan be rejected *in toto* (R. 3311).

On May 28, 1946, appellants filed "Defendants' Proposals Regarding Realignment of Schine Circuit," in an effort to obtain a decree which would satisfy the Government's desire to break up the Schine Circuit, thereby avoiding the necessity for an appeal, but without destroying the property and business which appellants had built up over a period of nearly 30 years. In such Proposals appellants advanced three separate plans of realignment, each of which contemplated the creation of separate corporations to own and operate theatres in specified localities, each corporation to have officers, directors, and stockholders distinct from those of the other corporations (R. 3415-31).

Plan 3, for example, provided for three corporations, one of which would own or lease, and manage, the theatres in New York, a second the theatres in Ohio, and the third the theatres in Delaware, Maryland and Kentucky. J. Myer Schine would own all the stock of the first corpo-

ration, Louis W. Schine all the stock of the second, and Mrs. J. M. Schine and Mrs. L. W. Schine all the stock of the third. Appellants proposed that each corporation should buy its pictures for exhibition separately and maintain separate office facilities, and that each should be subject to the injunctive provisions of the judgment, except those having to do with the sale or acquisition of theatres. (R. 3424-29).

On May 22, 1946, appellants made a motion before the District Court for an order directing that hearings be held at which testimony might be taken concerning the means of effectuating Section III of the amended judgment, relating to the realignment, reorganization or dissolution of the Schine Circuit, and concerning the plans submitted by the respective parties to carry out that provision (R. 3378).

In support of their motion appellants pointed out (1) that the evidence in the record was limited to acts prior to May 19, 1942; (2) that by reason of the consent order in this and the *Paramount* case and other factors, conditions and practices in the industry had changed substantially since that date; and (3) that in the case of most of the theatres affected by the Government's plan for sale there was no proof to show how such sale would affect either the appellants and their subsidiaries or competitive conditions in the area where such theatres were located. Thus there was no proof from which it could be determined whether the Government's plan or the appellants' plan would afford more effective relief under the circumstances. For the most part, such proof would not have been relevant during the course of the trial, because at that time no claim for such relief had been made by the Government.

Appellants called to the attention of Judge Knight the decision in the *Paramount* case immediately after it was rendered on June 11, 1946, and pointed out to him that there the Court, despite its findings of conspiracy and violations of the Sherman Act, had refused to require the major distributor-exhibitors to sell their theatres (R. 3447, 3459).

On June 24, 1946, the District Court denied the motion to take testimony (R. 3461).

On July 5, 1946, the Court handed down its opinion, without any additional findings, adopting the general features of the plan proposed by the Government, and entered its order for the purpose of effectuating Section III of the amended judgment (R. 3462-64; 3464-68).

The order decreed that appellants' interest in 58 theatres be sold, subject to the approval of the Court, by a trustee to be appointed by the Court, and that the proceeds of the sales be held in the custody of the Court (R. 3466-67).

The order required the dissolution of so-called "pooling agreements" in 3 towns, and forbade each appellant from acquiring financial interests in any additional theatres, except on an affirmative showing that such acquisition would not unreasonably restrain competition, and from buying or booking films for any theatre other than those in which such appellant owns a financial interest (3465-67).

The order contained a stay pending final determination of any appeal taken therefrom (R. 3467-68). On July 5, 1946, appellants made a motion to have the order amended or clarified to provide that the stay was applicable to all parts of the order and to direct the entry of a formal judgment in conformity with the terms of the order, or, in the alternative, to designate the order as a final appealable order. (R. 3468). Said motion was heard the same day, and the Court ruled that the stay contained in the order of July 5,

1946, applied to the entire order and that said order was to be construed as final (R. 3471-72). A petition for appeal was filed in the District Court on August 26, 1946, and was allowed on the same day (R. 3526-27).

The appeal was dismissed by this Court on December 16, 1946 (329 U. S. 686), for failure to comply with Rule 12 of the Rules of this Court, and a petition for rehearing was later filed. On January 13, 1947, this Court granted appellants' motion for leave to file a new statement as to jurisdiction. 67 Sup. Ct. 500. One week later this Court granted the petition for rehearing, vacated its prior judgment of dismissal, and noted probable jurisdiction. 329 U. S. 817 (R. 3755).*

**History of the Schine Circuit**

One of the important respects in which this case differs from the *Crescent* case is that the appellants are not a group of theatre operators who have joined together to increase their competitive power, but are, and have always been, a single business organization.

That organization was started on the proverbial "shoestring" by its present head more than 30 years ago. Like any other successful "chain" of theatres, it has grown from year to year as the organization has found and taken advantage of opportunities to acquire theatres by lease or purchase or to build theatres in places where they were needed and the prospects of earnings looked bright.

In 1917 J. Myer Schine, who had previously been connected with a theatre in Syracuse, learned that the Hippo-

*The record reference erroneously indicates June 20, 1947, as the date on which probable jurisdiction was noted.

drome in Gloversville, owned and operated by the Odd Fellows Lodge, was available for lease. Mr. Schine met with the Trustees of the Lodge and agreed to lease the theatre for 15 years for a rental of $1,500 per year. Mr. Schine was then 25 years old (R. 2629).

Mr. Schine quickly demonstrated his ability as a theatre operator. When he took over the Hippodrome, it was one of 3 theatres in Gloversville, and it was the least desirable of the three—a converted skating rink with 750 seats, poorly ventilated and with inadequate facilities. Business was bad. He analyzed the situation and came to the conclusion that people were not patronizing his theatre because they did not like it. Accordingly, he inaugurated a policy which has made him one of the most successful theatre operators in the country—the policy of spending money liberally to give the patrons of his theatres the most pleasant and comfortable surroundings. He redecorated and remodeled the theatre with new and improved facilities, in addition to playing the best pictures that he could obtain. Soon the Hippodrome was doing capacity business, and the Odd Fellows Lodge offered to sell the building to Schine. He bought it for $22,500 (R. 2632).

The other 2 theatres in Gloversville in 1917 were the Glove, a new motion picture theatre, and the Family, an older theatre which played both vaudeville and pictures. They were in a single ownership. Schine's operation of the Hippodrome was so successful that in 1920 the owner of the Glove and the Family approached Schine through a broker and offered to sell him the 2 theatres. Schine bought them (R. 2632).

Gloversville, headquarters of the Schine Circuit, where the individual defendants reside, has been a "closed" town since 1920. The Hippodrome has been progressively re-

modeled and improved from time to time during the intervening years, and it is now a large modern theatre, seating 1,151 persons, and with an investment in building and improvements of $117,500. The Glove Theatre, for which Schine paid $126,000 in 1920, has been improved to the extent of an additional $109,300, and it is also a large modern theatre, with 1,298 seats (Ex. D-150, R. 5183, 2634). The Family, which became a surplus theatre in view of the modernization and enlargement of the other two, has been converted to commercial use (R. 2730).

There is no evidence to show, nor has the Government even argued, that the Schine Circuit, in the oldest of its "closed" towns (or elsewhere), has failed to provide the public with first class entertainment at reasonable prices* or that there was anything improper in the acquisition or operation of the Gloversville theatres, or that the people of Gloversville have suffered by reason of the fact that for many years Schine has had—in the economic sense—a "monopoly" of the exhibition of motion pictures in that town.

In 1919, Schine had extended its operations beyond Gloversville by buying the Strand Theatre in Oneonta. Here again, as in Gloversville, Schine bought the least desirable of the 3 theatres in the town—one which by 1933 had become obsolete and unusable (R. 229). Nevertheless, Schine operated successfully in competition with the other theatres and in 1922 was able to buy the largest theatre in the town, the Oneonta. In 1923, the owner of the town's third theatre, the Palace, leased it to Schine (R. 229).

Oneonta has been a "closed" town since 1923. Here again there is not a shred of evidence to suggest that

*See Finding 29 (R. 3225).

there was anything improper in Schine's acquisition of the theatres in Oneonta or that anybody in Oneonta had ever been injured by, or had ever complained about, Schine's acquisition or retention of those theatres. In Oneonta, however, unlike Gloversville, Schine is to be divested of one of its 2 theatres by the order of the Court below (R. 3465).

The third town in which Schine obtained a theatre was Norwich, N. Y., in 1921 (R. 229); and in the phenomenal period of business expansion from 1922 to 1928, Schine plowed its earnings back into the business and gradually extended its operations to other cities and towns in New York, until by 1928 it had assembled, by purchase or lease, and was operating, 55 theatres (including 4 in which it had a 50% interest) in 27 cities and towns, all in the State of New York (R. 223-33).

There was not in 1928, nor is there today, any geographic concentration in the Schine Circuit. The 27 towns in which Schine had theatres in 1929 were located in 23 different counties in the State—from Amsterdam in the eastern part of the State to Buffalo in the west, and from Malone near the Canadian border to Salamanca, just above the Pennsylvania line. There is no "monopoly" pattern in Schine's selection of towns in which to invest in theatres, either before or after 1929. There is no pattern whatever, in fact, except that which results from a policy of investing in only the most promising available situations in the general area of operations.

In 1929 Schine greatly reduced the scale of its operations by leasing 25 of its theatres (R. 223-45) to Fox-Metropolitan Playhouses, Inc., a distributor-affiliated chain, and at the end of 1930 Schine was operating 25 theatres in 11 towns, including a new theatre which it built in that year in Cortland, New York (R. 223-45).

In 1930 Schine's attention was directed to theatre opportunities in Ohio, after a group of citizens of Bellefontaine, anxious to have an up-to-date local theatre, called on J. Myer Schine to interest him in completing construction of a theatre which another operator had started but had been unable to finish (R. 2668-69). Schine bought the unfinished building at public auction and put up a large modern theatre; and thereafter, from 1931 to 1941, each year saw the addition to the Schine Circuit of at least one theatre in Ohio.

Schine's expansion in Ohio involved the construction of 6 large and modern theatres, the Holland in Bellefontaine in 1931, the Van Wert Theatre in Van Wert in 1935, the Bucyrus Theatre in Bucyrus in 1936, the Vernon Theatre in Mt. Vernon in 1938, the Wayne Theatre in Wooster in 1938 (50% Schine interest) and the Norwalk Theatre in Norwalk in 1941 (2/3rds Schine interest), all towns that had been inadequately served with motion picture theatres before Schine came in (R. 234-37). It also involved the remodeling and improvement of theatres in Ashland, Athens, Delaware, Kent, Mt. Vernon, Norwalk, Piqua, Ravenna, Tiffin and Wooster (Ex. D-150, R. 5183, 2634).

Meanwhile, Fox-Metropolitan had gone into equity receivership, and the 25 Schine theatres in New York State, which had been leased to that company, reverted to Schine in 1933 (R. 223-45).

In 1936 Schine extended its operations to Kentucky by acquiring 4 theatres in Lexington and 4 in 2 other towns in Kentucky (all from the same owner). Further expansion took place from 1938 to 1941, when Schine acquired 13 additional theatres in 5 Kentucky towns (R. 238-39).

Schine entered the State of Maryland in 1938 and from 1938 to 1940 acquired 10 theatres in 7 towns in that State (R. 240).

In 1939 Schine acquired 2 theatres in Delaware, one in Milford and the other in Laurel (R. 241), and in 1941 2 theatres in Appalachia, Virginia (R. 241).*

In Kentucky, Maryland and Delaware, as in Ohio, Schine made large expenditures of money to remodel, refit and, in some cases, to reconstruct the theatres which it acquired—greatly improving the motion picture facilities of the towns into which it entered (Ex. D-150, R. 5183, R. 2634).

The Schine Circuit is an example of the typically American phenomenon of growth by means of successful operation in a changing and expanding industry and the plowing back of operating profits into the business. While it is today a business of substantial size, it is small in relation to the whole motion picture theatre industry, as will be seen from the number of theatres operated by Schine in relation to the total number of theatres in the 6 states where Schine was operating at the date of the consent order:

| State | Total Number** of Theatres | Number of Schine Theatres | Percentage of Schine Theatres |
|---|---|---|---|
| New York | 1,433 | 78 | 5.4% |
| Ohio | 1,015 | 36 | 3.5% |
| Kentucky | 348 | 18 | 5.1% |
| Maryland | 245 | 12 | 4.9% |
| Delaware | 36 | 2 | 5.5% |
| Virginia | 246 | 2 | .6% |
| TOTAL | 3,323 | 148 | 4.4% |

Scattered as they were over wide areas in 6 states, the Schine theatres presented no question of "monopoly" (in either the economic or the legal sense) on a national scale, or on the scale of a State or any large area within a State.

*The Virginia theatres have since been disposed of pursuant to the consent order of May 19, 1942 (R. 256-63).

**Film Daily Year Book (1943), p. 51.

There was nowhere any such regional concentration as would permit Schine to control the flow of pictures into, or the admission price structure within, any such area. There is nowhere such a regional concentration as led this Court in the *Crescent* case to conclude that the defendants there were seeking a monopoly in the areas where they were operating (323 U. S. 173, 181 and footnote on p. 182).

Within 60 of the 76 towns in which Schine had theatres as of May 19, 1942, there were "monopolies" in the popular sense of the word, in that Schine had the only motion picture theatre in each of 21 towns, operated both the theatres in 21 towns which had 2 theatres each, and had all the theatres in 16 towns that had 3 theatres each (R. 223-45). In addition, Schine had 6 theatres in Lexington, Ky., and 4 theatres in Oswego, N. Y., and no other operator had a theatre in those cities (R. 229-30, 238).

In the lower court the Government, by the manner in which it used the industry terms "closed town" and "open town", sought—and not without some success with the Court—to give the impression that there is something sinister and illegal about a "closed town". The fact is, however, that the term is used to describe the many thousands of places throughout the country in which there is only one theatre in the town, or in which the two or more theatres in the town are under a single operation.

A census taken by the industry publication, "The Film Daily", following the *Paramount* decision, revealed that some 6,800 theatres in the United States, or almost 40% of all the motion picture theatres in the country, are in one-theatre towns, and that the percentage of theatres in one-theatre towns to all theatres in the various states ranged from 15% in New Jersey to 65% in Nebraska.*

*The Film Daily, Vol. 90, No. 41, August 27, 1946.

As will be seen from the discussion under Point III, there are economic factors that tend to put both or all the theatres in a 2-theatre or 3-theatre town into a single operation. That there is nothing either unusual or evil in the existence of "closed towns" is well demonstrated by the fact that, of the 60 "closed" towns in the Schine Circuit, only 18 were "open" towns when Schine went into them. In the other 42 cases, Schine either acquired the theatre, or both or all the theatres, from a single owner, or put up a new theatre in the town and bought out the previous operator.*

The 18 towns that were "open" when Schine entered them, but which were "closed" as of May 19, 1942, fall into the categories listed below:

Three are towns in which Schine has been operating since before 1925 (Gloversville, Oneonta and Lockport);

One (Fostoria) is a case in which Schine and the other theatre operator merged their businesses, each taking a 50% interest and Schine taking over the operation of the theatres.

One (Mt. Vernon) is a case where the theatre was owned by the County and put up periodically for short-term lease at public auction. Schine first had the theatre, another operator then acquired the lease at public bidding, and six years later Schine reacquired it in the same manner.

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*In the *Crescent* case (323 U. S. at 180-81) 73 of the 78 towns in which the defendants operated were "closed" towns; and, since no two of the defendants operated theatres in the same town, the decree in that case did not have the effect of "opening" any towns.

One (Seneca Falls) is a case where the competitor went out of business because the bank which owned the theatre building refused to renew the lease and sold the building to Schine after the lessee had declined to buy it himself.*

Twelve (Ashland, Athens, Bucyrus, Carthage, Cortland, Delaware, Kent, Lexington, Maysville, Norwalk, Tiffin and Wooster) are cases where the other operator sold out to Schine.

In all such instances, the Government has attributed the result to some act or acts by Schine allegedly calculated to "monopolize", rather than to the operation of business factors and competition within the economic structure of the industry as Schine found it; and, as is shown under Point III, the lower Court found restraints of trade in acts of Schine merely *because* those acts may have induced or helped to induce the other theatre operator to sell out or go out of business and thereby give Schine a "monopoly" in the particular town, and without applying to those acts any of the standards laid down by this Court under the Sherman Act.

When the findings of the Court below are analyzed, it will be seen that it broadly condemned any conduct on the part of Schine which tended to give Schine a "monopoly"—in the economic sense of the word—in any town, or which enabled it to retain a "monopoly", in the economic sense, in any town.

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*It is indicative of the character of the Government's case that this instance is the sole basis for the charge in the complaint that appellants "have forced and attempted to force competitors out of business * * * by * * * (6) Acquiring the superior title in a theatre controlled or operated by another exhibitor, and taking over the control or operation of such theatre" (R. 51-52).

How far the lower Court went in ignoring the operation of economic factors may be illustrated by the case of Bellefontaine, the first Ohio town in which Schine operated. Before Schine came in, it was a "closed" town, its three theatres being in single ownership and leased to a single theatre operator, who kept one of them—the Strand—open and the other two closed. The Strand seated 480 people (R. 1416). Schine entered the town and built an expensive, modern theatre, with the latest equipment, seating 1,400 persons, and commenced to operate it on February 1, 1931, playing first-run the pictures of those distributors whose product the other operator had not bought for that season* (R. 1350, 1365). The public patronized the Schine theatre and the other operator began to lose money. About the first of June, 4 months after Schine's theatre started operating, the other operator sold out to Schine (R. 1367). Schine then took the Strand Theatre and thereafter operated it part-time, when the available business justified (R. 234, 244).

Instances like this one are a necessary result of the competitive process in the theatre business. If a progressive operator comes into a town like Bellefontaine, which is poorly served with motion pictures, and puts up a large, first-class theatre, the operator of the older theatre is bound to lose some of the patronage that he enjoyed when he had a "monopoly" in the town; and if, in a depression year like

*This is the first of many references in this brief to the purchase by a theatre of the "product" of a distributor. There are two things to be borne in mind in connection with such references, (a) that the reference is to the first run of the product, unless otherwise stated, and (b) that it is to all the feature product of that distributor in the particular season, since during the period involved the normal method of selling pictures was by "block booking", *i.e.* the sale of the whole product to a single theatre in any town.

1931, he cannot retain enough business to pay his expenses, he has no alternative but to shut up shop or sell out to some one who can run the theatre profitably as a part-time operation.

It seemed to be the view of the Government and the Court below, however, that Schine—because it possessed an evil property called "circuit buying power"*—should be disenabled from exercising the normal means of competing, and that the operator of the Strand—because he was an "independent"—had some kind of a vested right to be free from the competition of what the Government frequently characterized by such terms as "a powerful circuit intent on absorbing competitors".

In the Trial Court the Government made much of the fact that the lessee of the Strand sold the lease and equipment of the Strand to Schine (for $2,500) and that Schine thus acquired a "monopoly" in Bellefontaine.

But in a situation like that in Bellefontaine,—when the town is not supporting the full-time operation of 2 theatres —the operator of the new theatre is a logical (and perhaps the only) lessee for the old one (cf. R. 1026, 1040-42; 234). He can provide management for the 2 theatres with little, if any, more cost than for one. If the town will support both theatres on week ends, he can open on week ends, and similarly during school vacations, County Fair week and on special occasions.** During the slack summer

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*At a time, it will be noted, when the Holland Theatre in Bellefontaine was the only theatre that Schine had in the State of Ohio (R. 233-37).

**It may be noted that Mooney, the former operator of the Strand, had done the same thing. He operated the Strand full time and opened the Opera House only when business warranted it (R. 1415-16).

months, or when business is bad, he can close down one theatre and keep the other open, providing the public with as much entertainment as there is a demand for (cf. R. 226). If business conditions improve, so that the town will support 2 full-time theatres, he can provide the public with selective entertainment, at selective prices, by playing his best (A) pictures in the big theatre and his less attractive (B) pictures, at lower admission prices, in the smaller theatre (cf. R. 236).

In other words, the operator of the Holland Theatre in Bellefontaine was—and any other experienced and efficient operator of that theatre would have been—the person in the most favorable position to operate the Strand without losing money. Schine was, therefore, the best customer for the operator who wanted to sell out and naturally, from the standpoint of the owner of the theatre, was the most desirable tenant (cf. R. 228, 234).

The Government, at the trial, and the Court in its opinion and findings, laid great stress on the ability of Schine to go into a new town and get the first runs of the distributor's products for its theatre—as if there could be no explanation for that except a "conspiracy" with the distributors. But the explanation is simple and obvious. Even the most casual study of the growth of the Schine Circuit and its expansion into new towns will reveal that Schine was an investor in underdeveloped situations; that it went into towns which, by and large, no other skilled operator had gone into, and which offered opportunities for more business than the existing operator or operators were getting from the public.

By and large, Schine went into towns that needed a new theatre, or an improved theatre, or more skillful management—in short, a better outlet for the product of the

distributor. That was what Schine had to offer to the distributors as an inducement to get their pictures on first runs—good and well-managed theatres, involving good physical facilities, as a result of Schine's policy of making his theatres as attractive as possible to the public; skill in the selection of programs and in advertising and exploiting pictures; know-how as to what the public wanted, in any particular town; and a proved ability to keep theatre attendance at a high level—all factors that were reflected in the gross receipts of theatres and hence in the rentals paid to distributors.

It is unnecessary to look for a "conspiracy" between Schine and the distributors, in order to account for Schine's success in buying pictures, because that success is fully explained by the operation of business factors which are obvious from the evidence in the case.

**Relation of this case to the *Paramount* case**

We understand that the Government intends to argue the present case, the *Griffith* case and the *Paramount* case before this Court as interrelated cases; and it may therefore be helpful to discuss the nature of the economic problem which the present case brings into focus and its relation to the problems dealt with in the *Paramount* case.

There are certain specific issues in the present case, as to whether Schine did or did not engage in particular practices—such as making threats to open closed theatres in order to scare off potential competitors—as to which issues we show in the Argument that the findings are based upon unsubstantial evidence or relate to matters that are of no significance.

But issues of that sort are not of the essence of the Government's case, insofar as it bears upon important

problems of the motion picture industry. The essence of the case—as shown by the persistent emphasis on "buying power" by both the Government and the District Court—is that in the industry as it existed Schine had certain advantages over other theatre operators who were less powerful or less successful in the competitive struggle for product.

We do not contend for a moment that the ability of the smaller theatre operators throughout the country to get product in competition with the larger units in the industry is not, or has not been, one of the important economic problems of the motion picture business. On the contrary, we recognize it to be an important problem; and it is a problem that affects Schine, just as its affects other theatre operators. The lower Court has attributed to Schine "great buying power" and ability to "dictate terms to the distributors", but it should be noted that Schine, in spite of its success as a theatre operator, has never been able to acquire more than a subordinate position in any of the large cities, from which the bulk of the revenues of the distributors is derived.

It may be noted—to emphasize the inherent improbability of the finding that Schine "was enabled to dictate terms to the distributors"—that the 5 largest unaffiliated circuits in the country (presumably including Schine) together pay less than 5% of the total domestic film rentals received by the 8 large distributors (*Paramount* case, Finding 126).

If Schine had superior competitive power as compared with smaller units in the industry, it also had—and for the same reasons—inferior competitive power in relation to the larger units in the industry. That is apparent from

the competitive position that it occupies in the large cities, where the major chains operate the principal theatres. Schine has been a theatre operator in Syracuse, a town of 200,000 population, since 1927; but its position there since 1935 has been only as a partner of RKO. Schine has been operating theatres in Rochester since 1924, and in Buffalo since 1926, but in neither city has it ever been able to rise above a second-run status, operating neighborhood and suburban houses. It simply has not had sufficient competitive power to get into the first-run business in cities where larger units were operating theatres.

Whether the comparison be made between Schine and an operator with greater competitive power, or between Schine and an operator with less competitive power, the superiority of one competitor over another cannot be considered, from the standpoint of the Sherman Act, apart from a consideration of the industry's method of doing business, particularly the methods employed by the distributors in selling pictures, including the system of runs and clearance and the practices of block booking and selective selling.

Block booking and selective selling were referred to in the *Paramount* case (66 F. Supp. at 348) as follows:

> "For many years the distributor-defendants licensed their films in 'blocks', or indivisible groups, before they had been actually produced. * * * In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancelation for a certain number of pictures * * *."

Selling on an all-or-none basis is "block booking"; selling with rejection privileges is a variant of block booking, called "selective selling". The theatre operator contracts

for the whole product that a particular distributor is expecting to release, but he does not expect to play it all. He expects to use his rejection privilege to exclude "B" pictures, playing only "A" pictures if enough of them are available.

Because of those methods of selling, the exhibitor in a superior competitive position in a particular town—who by and large would be the exhibitor who could produce the maximum of revenue for the distributor in that town—could buy all the product of those distributors that he considered the most reliable—or from which he could get the best terms—and then make selective contracts with other distributors, thereby assuring himself of their best pictures.

Again because of those methods of selling, the exhibitor in a superior competitive position could, by his determination of the policy on which his house would play, influence—or even determine—the policy on which his competitor's house would have to play. This point we desire to emphasize and to make specific by means of an illustration.

To understand that illustration, it is necessary to understand what is meant by a theatre's "policy" and to appreciate one unique characteristic of the motion picture business.

The term "policy", as applied to a theatre, refers principally to the run or runs of product which the theatre plays and the frequency with which it changes programs. A theatre may have a "first-run policy", a "second-run policy", a "one picture per week policy", a "four changes per week policy", etc. It may have an "A-picture policy", meaning that it plays only the "A" pictures of particular distributors, *i.e.*, those of the feature pictures which are costly and elaborate and have a greater drawing power than the "B" pictures, which are the ordinary run of features. The

term "policy" is also used with reference to admission prices, as in the statement that a theatre has a "20¢ policy".

The unique characteristic of the theatre business, which distinguishes it from other businesses, and which is more fully explained under Point III, is this: The smaller the population in the area where the theatre operates the greater the number of feature pictures it must offer to the public. A large house in the theatrical district of New York, because of the large population that it has to draw upon, may play only 20 or 30 feature pictures in a year; whereas a theatre in a one-theatre town may play several hundred, changing its program 3 or 4 times a week, and often playing double features. It is therefore in the small 2-theatre or 3-theatre town that the greatest demand for first-run product will be found to exist.

Where, in a 2-theatre town, both theatres are under the control of a single exhibitor, he is free to set the policy for both theatres in the way that he thinks will provide the public with the maximum amount of amusement that they will pay for, and hence yield him the maximum revenues; and a usual method of doing business in such a situation is to run the better house on an "A" policy and the other house on a "B" policy, with a substantial admission price differential between them—attracting to the "A" theatre the more discriminating audiences, who are willing to pay the higher price to see the better pictures, and attracting to the "B" house those who are more easily entertained and prefer to pay the lower price.

In such a situation, the operator of the two theatres may buy and play all the product of the 8 large distributors, and then, when the pictures are released, book the outstanding pictures in the "A" house and the balance in the "B"

house, supplementing the latter with second-run of the "A" product to the extent that it is profitable to do so.

This illustration leads us to our specific example of how the selling methods of the distributors, as they existed before the *Paramount* consent decree, made it possible for the superior competitor, by means of the policy that he set for his theatre, to have an influence—or even a determinative effect—on the policy that his competitor would have to adopt. Our example is a 2-theatre town, where one theatre was superior to the other, so that the distributor preferred it for their pictures, but where there was no wide disparity between the physical facilities or the ability of the two managements, and where both operators wanted to play the pictures of the large distributors on the earliest run that they could get.

In such a situation Theatre X, the superior theatre, could buy the whole product of some distributors on first run and the product of the remaining large distributors, also on first run, under a selective contract, with the result that the competitor, Theatre Y, would have available to it only (a) the product of any large distributor with whom in any season Theatre X could not agree on terms,* (b) first run of the pictures rejected by Theatre X, which would generally be "B" pictures, (c) first run of the pictures of "independent" producers, which are numerous but generally not above "B" grade and (d) second runs of the pictures of the large distributors. In other words, the superior competitor, by making his own theatre an "A" house, automatically forces his competitive theatre to become a "B" house, or, if the competitor prefers, a second-run house.

*A number of illustrations of this type of situation appear under Point III of the Argument.

A situation resembling that above described existed in Norwich, N. Y., where the competing operators were Schine and the Smalley Circuit. That situation, on which there is evidence in the record, did not result from any common purpose between Schine and the distributors to hurt Smalley, or to put his circuit out of business, or to deprive him "arbitrarily" of product, or anything of the sort. The distributors had no conceivable interest in hurting him, especially since in his area of operations he was a relatively substantial customer for the distributors' pictures and had theatres in 12 "closed" towns—giving him "buying power" that he freely admitted using in bargaining with distributors for his "open" towns (R. 2458-59).

The situation in Norwich resulted simply from the fact that Schine embraced the competitive opportunities that were available to it because of the distributors' methods of selling.

There are not many situations in the present case that resemble the case of Norwich. In most instances where Schine obtained the preferred position in a town, there was a wide disparity between Schine's theatre and that of the competitor, and it would be unreasonable to expect the distributors, from the standpoint of their revenues, to do business on a preferred run with the competitor if they could agree on terms with Schine. However, to the extent that there are other situations in the case which exemplify the economic power of the stronger competitor, they were nothing more nor less than a natural result of the distributors' methods of selling.

Whatever may be the true view of the law, as to whether the distributors *ought* to have offered their pictures on the basis of block booking, or *ought* to have offered selective

contracts or given out franchises, the fact is that the distributors did conduct their business in that manner. They offered the superior competitor in any situation the opportunity to get their first-run product (or second run, as the case might be) on the basis described.

In such a situation it would be asking a great deal of the theatre operator to expect him to refrain from taking advantage of the opportunities thus presented to him, if by doing so he could make the best use of his theatre or theatres and derive the maximum profit from them.

Specifically, it is asking a great deal of an exhibitor who needs and can use the product that the large distributors offer him, if we expect him to say to the distributors: "No, I do not want to accept all your product. I want you to give some of it to my competitor."

Such restraint is not ordinarily expected of those who engage in the competitive struggle called "business".

If taking advantage of the opportunities offered by the distributors amounted to a conspiracy with the several distributors, then there was—before the consent decree in *Paramount* case—an innumerable series of such conspiracies throughout the country—involving the distributor-affiliated chains, the independent chains, large and small, the operators of groups of houses and the operators of individual houses—because all the theatre operators of the country bought their pictures, and had no choice but to buy them, under the system of selling that the distributors maintained. Perhaps that is what the Government meant, in its press release in the *Griffith* case, when it said that there were many other chains of theatres in the United States whose situations were similar to that of the Griffith chain.

The economic issue that underlines the present case is a minor phase of the issues presented in the *Paramount*

case. The issues in the *Paramount* case were *cause*, those in the present case *effect*. Since the consent decree in the *Paramount* case, Schine has not been in a position to buy pictures in the manner above described, because under that decree a different system of selling was put into effect. Since the consent order in the present case, Schine has been required to buy pictures in all "open" towns on the equivalent of a town-by-town basis (R. 260-61). Finally, the judgment in the *Paramount* case established a method of selling pictures on a theatre-by-theatre and picture-by-picture basis.

The conspiracies charged to Schine and the several distributors, which Government counsel said "continued up to the date of the entry of that order on May 19, 1942", ended then; and the Government so admitted, when counsel said that "the continuance of the conspiracies was not permitted by the order, of course, and I assume it didn't occur" (R. 487-88). For that reason, and because of the radical innovations that the *Paramount* consent decree, and later the judgment in the *Paramount* case, introduced into the industry, the present case is not only old, but is stale.

It is the ultimate decision in the *Paramount* case, much more than the decision in the present case, that will determine how Schine and other theatre operators conduct their business in the future and what their competitive positions will be, whether in relation to the larger units in the industry or to the smaller ones.

## Summary of Argument

I—The order of divestiture was neither necessary nor appropriate but was improvident and an abuse of discretion by the Trial Court.

1. There is no support in the authorities for an order of divestiture in this case.

2. The findings of the Court do not support an order of divestiture.

3. The order of divestiture was based upon theories which this Court has never sanctioned and which are plainly erroneous.

4. Even if divestiture were an appropriate remedy, the Court could not properly have made the order of divestiture because, having refused to take testimony as to conditions existing when the order was made, it did not have before it the evidence necessary as a basis for such an order.

5. The order of the Court appointing a trustee to sell appellants' theatres was particularly improvident, and far beyond the discretion of the Court.

6. The order of the Court was especially arbitrary as it applied to the sale of theatres remaining undisposed of under the consent order of May 19, 1942.

II—Both the findings and the judgment of the Court are vitiated by erroneous rulings with respect to the admission and the effect of evidence.

The error in the admission of evidence is substantial.

III—The findings of the Trial Court are not supported by the evidence and are insufficient to support the judgment.

IV—The injunctive provisions of the judgment and order of divestiture appealed from (a) violate Section 19

of the Clayton Act and Rule 65(d) of the Rules of Civil Procedure, (b) are invalid for indefiniteness and (c) are in excess of any appropriate remedy, in addition to being unwarranted by the findings below or by the evidence.

## Point I

**THE ORDER OF DIVESTITURE WAS NEITHER NECESSARY NOR APPROPRIATE BUT WAS IMPROVIDENT AND AN ABUSE OF DISCRETION BY THE TRIAL COURT.**

The relevant assignments of error are Nos. 1 to 64 (R. 3473-90).

The divestiture relief asked by the Government was based upon paragraph 57 of the complaint, which alleged that "the circuit buying power of the Schine defendants is now so great that its continued existence will unreasonably restrain trade and stifle competition in the exhibition of motion pictures * * * in all towns where the Schine defendants have or may hereafter acquire theatres, and will subject competing exhibitors to other and additional restraints, even if the foregoing restraints are enjoined, unless the circuit buying power is eliminated. Said circuit buying power can be eliminated only by the dissolution of the Schine circuit" (R. 55).

In the prayer for relief the Government asked that "the corporate Schine defendants, and each of them, be dissolved, and that the respective properties of said corporate defendants and of the individual Schine defendants be divested and rearranged under several separate and independent corporations or companies in such manner as to terminate effectively the aforesaid monopolistic control in

the licensing and exhibition of motion pictures and to prevent further violations of the Sherman Anti-Trust Act, and that said Schine defendants, their officers, directors, agents and representatives be required to make such divestiture and conveyances of their stockholdings and properties as shall be necessary in order to accomplish such dissolution" (R. 56-57).

The Court was also asked to appoint such receivers and trustees as might be necessary to effectuate a dissolution of the corporate defendants, and "a divestiture and rearrangement of the respective properties of said corporate defendants and of the individual Schine defendants in such manner as may effectively bring about the elimination of the aforesaid monopoly in the licensing and exhibition of motion pictures" (R. 57).

In the judgment the Court directed that:

> "The defendants and their affiliated corporations be dissolved, realigned, or reorganized in their ownership and control so that fair competition between them and other theatres may be restored and thereafter maintained * * *"

and that the parties should submit plans "for such dissolution, realignment or reorganization as they believe will attain this end" (R. 3108-09).

The proposal submitted by the Government called for appointment of a trustee who would sell "as rapidly as possible" (R. 3242):

(a) The one theatre in each of 17 towns where Schine had the only theatre in the town;

(b) All but one of the theatres in each of 34 towns where Schine had more than one theatre;

(c) Interests in 5 theatres, which had been offered for sale under the consent order of May, 1942, but for which no buyers had been found;

(d) Two of 4 named theatres in Rochester;

(e) One or more theatres in 9 named towns (four of them one-theatre towns), where the Government said there were "pooling arrangements" that should be dissolved;

(f) Eight theatres in one or the other of each of 8 pairs of nearby towns (*i.e.*, within about 25 miles or less of each other), and 2 out of 3 theatres, in a case where Schine had a theatre in each of 3 nearby towns.

Thus the Government proposed (a) that Schine should be divested of at least one theatre in every town where it was operating, except Buffalo, and (b) that the Schine Circuit should be reduced from 133 theatres in 71 towns to the point where it would be operating 2 theatres in Syracuse, some neighborhood theatres in Rochester and Buffalo, and one theatre in each of 30 smaller towns (R. 3231-34).

It is believed that no such wholesale destruction of a business and confiscation of property had ever before been asked in a Sherman Act case; and certainly no remedy so harsh and unfair had ever been granted.

Nevertheless, the Court stopped only a little short of granting the relief that the Government asked for. It eliminated from the divestiture decree (a) the one-theatre towns, permitting Schine to retain the theatres in such towns; (b) the 10 towns in which a theatre would have to be sold, under the Government's proposal, because it was within 25 miles of a town where there was another Schine theatre; and (c) the town of Shelby, Ohio, where Schine

had only one of the three theatres in the town. In each of four towns where Schine had three or more theatres—Auburn, Lexington, Oswego and Wooster—Schine was to be allowed to keep two theatres, instead of one. With respect to Malone, N. Y., where the consent order had called for the sale of a theatre acquired in 1941, the Court gave an option to the appellants as to which of the two Malone theatres would be given up, by including that town among those in which all but one of the Schine theatres was to be disposed of.

Finally, the Court eliminated from the divestiture decree the two theatres in Gloversville, apparently because the Court, dispensing a broad kind of fireside equity, chose to let the situation stand as it was in the town that was the birthplace of the business, the headquarters of the company and the residence of the individual defendants (R. 3153).

In all other respects the Court gave the Government the relief that it asked for by way of divestiture. It ordered divestiture in 43 of the 71* towns in which Schine was operating. To put it in another way, the Court ordered divestiture in 43 out of the 51 towns that were not 1-theatre towns. Out of a total of 132** Schine theatres, Schine is to be divested of 58 (R. 3464-66).

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*Schine had withdrawn from 5 towns—Appalachia, Va., Bowling Green, O., Clifton Springs, N. Y., Scotia, N. Y., and Pikeville, Ky.—pursuant to the consent order (R. 275-76, 2988).

**The theatres totaled 133 at the date of the judgment, February 25, 1946. In the following month Schine's lease of the James Theatre in Syracuse, N. Y., expired, so that it had 132 theatres at the date of the divestiture order, July 5, 1946.

**I. There is no support in the authorities for an order of divestiture in this case.**

Section 4 of the Sherman Act confers "jurisdiction" upon the federal courts "to prevent and restrain violations" of the Act. The ordinary method of preventing and restraining such violations is by use of the injunctive processes of the equity court. Divestiture is an extreme remedy, to be granted only when a violation exists which cannot be prevented or restrained by injunction. The principles that have always controlled the granting of such relief are stated in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77-8, where the necessity for dissolution was rested on the fact that "* * * the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization * * *".

All cases in which the courts have resorted to the extreme remedy of dissolution or divestiture are cases in which an injunction directed to future conduct would have been insufficient to remove the violation of the Sherman Act that existed. They fall into 2 classes:

(a) Cases in which monopoly power has been found to be vested in and exercised by a single corporation: *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co., supra*; *United States* v. *Corn Products Refining Co.*, 234 Fed. 964; *United States* v. *Eastman Kodak Co.*, 226 Fed. 62; *United States* v. *E. I. Du Pont de Nemours & Co.*, 188 Fed. 127; and

(b) Cases in which monopolies or restraints of trade have been carried out by a combination, and where the combination itself has been found to be in violation of

the Act: *U. S.* v. *Crescent Amusement Co., supra; United States* v. *Southern Pac. Co.*, 259 U. S. 214; *United States* v. *Reading Co.*, 256 U. S. 26; *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *Northern Securities Co.* v. *United States*, 193 U. S. 197.

In either type of case what the courts have done has been to restrain and prevent the violation—the monopoly in the first class of cases, and the combination in the second class—from continuing to exist.

The courts have never ordered the divestiture of property for the purpose of "creating competition" or as a means of restraining unlawful practices which can effectively be prevented by prohibitions directed to future conduct. In *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, and in *United States* v. *National Lead Co.*, 332 U. S. 319, the Government sought divestiture of property, in one case the nullification of patents and in the other the sale of physical properties, as a means of creating competition. In both cases this Court denied relief, pointing out in substance that it was the misuse, and not the possession, of the patents or physical properties that violated the statute, and that relief against the misuse of such property had been afforded by the judgment in both cases—in the one case the nullification of agreements based on the patents, and in the other the cancellation of agreements to which the acquisition or use of property "may have been incidental or related" (332 U. S. 319, at 351).

*U. S.* v. *Crescent Amusement Co., supra*, affords no precedent for the divestiture order in the present case. In the *Crescent* case there were several corporations and a co-partnership, representing a number of chains of

theatres with interlocking ownerships. The District Court ordered each corporate exhibitor to divest itself of ownership of any stock interest in the other exhibitors and enjoined two of the individual defendants from acquiring control over any of the defendant exhibitors except his own company.

There was nothing in the decree in the *Crescent* case that even resembled the town-by-town divestiture which has been ordered here, although the Court in the *Crescent* case specifically found (as the Court in this case did not find) that the defendants there had been guilty of "Coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices" (323 U. S. at 179); and although the Court in the *Crescent* case specifically found (as the Court here did not find) that competitors had been driven out of business by the predatory practices of the defendant (*Id.* at 181); furthermore the Court found in the *Crescent* case that the defendants had prevented competition among themselves by dividing territory and had in substance a regional monopoly, as witness the finding which this Court quoted (323 U. S. at 182) that:

> "Of the forty-five towns in Tennessee listed in the 1940 census as having populations between 2,500 and 10,000, Crescent and its affiliates now operate theatres in all but nine. The independents operating in three of those nine towns have already been approached by Sudekum emissaries with the suggestion that they sell out to one of the defendant exhibitors."

This Court's description of the basic violation of law in the *Crescent* case (323 U. S. 183) was that "* * * the vice

of this undertaking was the combination of several exhibitors in a plan of concerted action * * *"; and the order of divestiture did no more than to restrain them from continuing that unlawful combination.

With reference to the lower Court's purpose (stated in the divestiture order) "that the theatres disposed of may operate in competition with theatres retained by the defendants" (R. 3466), it is pertinent to recall what this Court said in the *National Lead* case,*

> "* * * It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws."

Broad as is the inherent power of courts of equity, they have never undertaken to create situations, of competition or otherwise, to meet their particular notions of public policy.

**2. The findings of the Court do not support an order of divestiture.**

In respect of none of the 43 towns covered by the divestiture order is there a finding by the Court (a) that Schine had acquired the theatres to be disposed of by illegal means, or (b) that continued possession of a theatre or theatres in that town was a violation of the law, or (c) that divestiture was necessary to remedy a condition existing in that town, which could not be remedied by the injunctive processes of the equity court.

For most of the towns there was no evidence before the Court except (a) the bare fact that the theatres in such

*332 U. S. 319, 353.

towns are listed among those covered by Schine's contracts with distributors for pictures, and (b) the bare facts concerning control, ownership, lease, date of acquisition and other historical and financial details listed in appellants' answers to the Government's interrogatories.

Eleven of the 43 towns, in fact, are not even mentioned in the Court's findings. They are:

Athens, O.
Cambridge, Md.
Cumberland, Md.
Delaware, O.
Easton, Md.
Maysville, Ky.
Middlesboro, Ky.
Piqua, O.
Ravenna, O.
Richmond, Ky.
Wooster, O.

The following 4 additional towns in which divestiture was ordered are mentioned only in Finding 3, an historical recital which lists (a) theatres leased to Fox-Metropolitan in 1929, and (b) theatres which Schine was operating in 1930:

Cortland, N. Y.
Oneonta, N. Y.
Oswego, N. Y.
Syracuse, N. Y.

With respect to the remaining 28 towns, the findings are insufficient to support an order of divestiture. Such findings are analyzed and discussed under Point III. We

note here some of the more obvious cases where the insufficiency of the findings appears on their face.

**Harlan, Ky.**

For Harlan there is no finding except 9(a), where it is said that Schine "arbitrarily deprived" a competing theatre of 10 pictures of a single distributor—Warner—in that town in a single season—1941-42 (R. 3216).

**Ashland, O.**

The sole finding with respect to Ashland (No. 17, R. 3221) is that "Metro gave clearance [to a Schine theatre in Ashland] over Loudenville* and Lodi, Ohio;" * * * (R. 3221). In other words, a single distributor gave Ashland, a county seat with 12,500 population, a period of clearance over 2 nearby towns, having respective populations of 2,300 and 1,300. The Court, it may be noted here, neglected to point out that Ashland was in turn subject to clearance in favor of a larger town in the same area—Mansfield—which had a population of 37,000 and where there was no Schine theatre.**

**Ogdensburg, N. Y.**

Ogdensburg is mentioned only in Finding 14 (R. 3219), where the simple fact is stated that "Schine cut admission prices at * * * Ogdensburg", without anything to show what circumstances, if any, made the cutting of admission prices—on its face a public advantage—a violation of

*Spelled Londenville in the Finding.

**Among the various contracts in the record which show the clearance of Mansfield over Ashland are Ex. 981 (47), R. 5699, 2547; Ex. F-183, R. 6115, 1181.

the Sherman Act, and in Finding 17 (R. 3220-21) where the Court quotes an inadmissible memorandum in which a Warner branch manager expressed the opinion; in a letter to his home office, that "Canton would do more business if it were not for Schine at Ogdensburg having 30 days clearance and if it was reduced; 'It will make a better condition for us all * * *' ".

**Canandaigua and Salamanca, N. Y.**

Canandaigua and Salamanca are mentioned only in Finding 10 (R. 3217), where it is said "'Schine' made threats to build in various towns, such as * * * Canandaigua by a sign and newspaper article published, *and where he eventually did build* [Italics supplied]. * * * In Salamanca, just after independents acquired a site for a contemplated theatre, through the press 'Schine' announced its intention to build" (R. 3217). It should be noted here that, actually, no Schine competitor ever acquired any site in Salamanca.

**Fostoria, Herkimer, Kent, Little Falls and Tiffin**

Five towns are mentioned (outside of the historical Finding 3) only in Finding 9(b), having to do with unreasonable periods of clearance (R. 3216):

Fostoria, O.
Herkimer, N. Y.
Kent, O.
Little Falls, N. Y.
Tiffin, O.

and the evidence for those towns consists of nothing more than the periods of clearance written into some of the con-

tracts for pictures, without anything to show the circumstances considered to make the periods of clearance excessive, or to show that anybody was injured by them, or in fact that they had any practical application in real life; and, as shown under Point III, the periods of clearance written into certain contracts for those towns are irrelevant to any issue in the case.

**Newark, N. Y.**

Newark is mentioned in Finding 3, the historical recital referred to above, and is alluded to (though not named) in Finding 25, which relates to an agreement by United Artists, a single distributor, to give clearance to that town over the town of Sodus, which was charging a lesser admission price (R. 3224).

Thus, of the 43 towns in which the lower Court has ordered the sale of theatres of the Schine Circuit,

11 towns are not mentioned in the findings;

4 towns appear in the findings only in an historical list; and

11 other towns appear, outside of such historical list, in findings which on their face are insufficient as the basis for a divestiture order.

With respect to the remaining 17 towns involved in the order of divestiture, it is shown elsewhere in this brief that the findings with respect to each of them are also insufficient as the basis for an order of divestiture.

**3. The order of divestiture was based upon theories which this Court has never sanctioned and which are plainly erroneous.**

The view of the lower Court that it was entitled to grant relief by way of divestiture was based upon a number of novel propositions, for which the authorities under the Sherman Act furnish no support. In the first place, the Court said:

> "Well, it isn't solely a question of restoration of competition. The question is, perhaps, a question of punishment. The Court has found a violation of the Anti-Trust Law. Assuming that the evidence pertaining to a single theatre town, the theatre owned by Schine, disclosed that as a result of their conspiracy or their actions somebody has been wiped out of existence, it wouldn't simply be a question of competition; it would be a question of penalizing the defendant under those particular circumstances because of his acts (R. 3386)."

It may be noted at this point that there is no finding by the Court that anybody has "been wiped out of existence" in any town, at any time, as the result of a restraint of trade by Schine.

Later, the Court said that in describing divestiture as a penalty it had not used the word "penalty" in its ordinary sense but as meaning "in the nature of a remedy to which the Government is entitled" (R. 3407). But it is clear that the Court continued to think in terms of punishing the defendants for what it had found to be violations of the Sherman Act. For instance, in a discussion of the need for contemporary information in order to frame an appropriate decree looking toward the future, counsel made

the point that evidence as to clearance in a particular situation as of 1935 or 1936 was not germane to the problem of dealing with clearance in the same situation in 1946. The Court replied:

> "Well, of course, that again begs the question. You may today strictly be observing the provisions of the law in all respects as to clearances, cumulative buying, and things of that kind. But the Court has found the fact to exist that there has been a conspiracy here and has made some directions in regard to it" (R. 3413).

It was also pointed out to the Court that the consent decree in the *Paramount* case had completely changed the clearance system used in the industry and had set up machinery for enforcing reasonable clearance provisions in the contracts of the major distributors. But the Court said it would make no difference in the relief to be granted even if the practice of clearance had been entirely eliminated from the motion picture industry, because, "assuming the law has been violated, I don't see how the fact that the situation was changed today, or a little earlier, affects the right of the Court to order reorganization or some change" (R. 3400). Counsel then pointed out that the Court had already granted injunctions "that protect the Government and protect the public," but the reply was:

> "The Court: That is very true, but that is an entirely different situation" (R. 3400).

What the Court meant by "an entirely different situation" is revealed in another colloquy with counsel, as follows (R. 3407-08):

"Mr. Hays: Well, my point is that if it is a remedy then it must be based on conditions today and on evidence as to what will maintain future competition.

"The Court: Well, you say we can do that just by stopping any further violations of the Anti-Trust Laws, and leaving the organization as it is?

"Mr. Hays: That may be in some cases. But I would want evidence to show that.

"The Court: Well, we would have no lawsuit then at all. Just put the defendants on probation for a while."

Thus the Court, using an analogy from the criminal law, again revealed its conception of the relief in the case as punitive. If a decree in a Sherman Act suit is limited to injunctive relief alone, there is "no lawsuit then at all", according to the District Court.

It was the Court's view that relief did not have to be limited to towns for which the Court had made findings of restraint of competition, or even to towns for which the Government had introduced evidence. The following colloquy is pertinent:

"Mr. Hays: Then your Honor knows there were many towns here where the Government proposes to sell our theatres where there was no evidence in the record?

"The Court: That is true.

"Mr. Hays: On what basis do they present such a novel proposition?

"The Court: Well, the basis, as I construe it, is on the large basis that the Court has authority to reorganize the whole setup of the corporation." (R. 3401).

Then, at R. 3405, the Court formulated the question before it, with respect to one of the towns for which there was no evidence, as follows:

> "Well, then, the question is whether the Court, by and large, in the absence of any testimony as to competition or anything else, has the right to include that town in the whole plan of reorganization."

Then the Court proceeded to decide—exercising authority "to reorganize the whole setup of the corporation" (R. 3401)—that, with respect to each of 15 towns for which there was no evidence whatever, it had "the right to include that town in the whole plan of reorganization" (R. 3405). Gloversville, the original Schine town, was excluded. Buffalo, where the Government asked no relief, was also excluded.

In its brief before this Court in *United States* v. *National Lead Co., supra,* the Government explained the action of the court below as follows:

> "* * * In the *Schine* case the district court ordered a divestiture of theatres in towns where there was no evidence of elimination of existing competitors as a means of creating competition for the defendants. That court recognized that the possession of certain physical assets not independently used in connection with any specific law violation was also a continuing threat to independent competition. * * *"

It seems hardly necessary to argue that this Court has never sanctioned either (a) the lower Court's theory that it had a broad discretion to "reorganize the whole setup of the corporation", or (b) the Government's theory that

a district court has an equally broad discretion to order divestiture of physical assets merely because they are a "threat to independent competition". The jurisdiction of the federal courts under Section 4 of the Sherman Act is remedial, not penal (see *Swift and Company v. United States*, 196 U. S. 375, 396) and it is to be exercised in accordance with accepted principles of equity.

"An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." *Meredith* v. *Winter Haven*, 320 U. S. 228, 235. In *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329-30, this Court, after referring to "the requirements of equity practice with a background of several hundred years of history", said:

> "* * * The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims * * *."

Certainly no one could fairly describe the decree in the present case as partaking of either mercy or practicality or as involving a "nice adjustment and reconciliation between the public interest and private needs."

**4. Even if divestiture were an appropriate remedy, the Court could not properly have made the order of divestiture because, having refused to take testimony as to conditions existing when the order was made, it did not have before it the evidence necessary as a basis for such an order.**

When the Government submitted its proposal for the virtual destruction of their business, appellants made a motion to take further testimony "relevant, pertinent and necessary to the consideration of the method of compliance" with the provision of the judgment that ordered the defendants and their affiliated corporations to be "dissolved, realigned, or reorganized in their ownership and control so that fair competition between them and other theatres may be restored and thereafter maintained" (R. 3230, 3378). That motion was denied.

The case was tried on a stale record, not only because the Government limited its evidence to a period of time which ended more than two years before the trial, or because much of the evidence related to events that occurred in the early and middle 1930's, but also because the consent decree in the *Paramount* case had completely reorganized the business of selling and buying motion pictures.

The Court was plainly in error when it said, in substance, that such considerations were irrelevant to the framing of its order (R. 3413). Not only were they relevant to the framing of such an order of divestiture, but they were equally relevant to the framing of a decree enjoining what the Court found to be violations of the law, since "Equity acts in the present tense", and moulds its decree to actualities, not history." *Champion Spark Plug Co.* v. *Reich*, 121 F. (2d) 769, 772, *cert. den.*, 314 U. S. 669; see Restatement

of Torts, Vol. IV, § 935. The rule was stated by the New York Court of Appeals as follows:

> "Differing from the rule in actions on the law side of the court, which limits the judgment to the facts as they existed at the commencement of the action, when the action is in equity, relief will be administered as the nature of the case and the facts, as they exist at the close of the litigation, demand." *Russell H. & I. M. Co.* v. *Utica D. F. & T. Co.*, 195 N. Y. 54, 60.

When the Court asked the parties to submit plans for the reorganization or realignment of the defendants it was proposing to take action in a situation that existed in 1946, more than 4 years after the last date for which there was evidence in the record. There was nothing in the record to show what the current competitive situation was in any of the towns affected by the decree. Shifts of population had occurred during the war, towns had grown or diminished in size. Theatres had been built, theatres had burned down, theatres had been closed and put out of use. For all the record showed, Schine's position in the industry may have been widely different from what it was in 1942.

The theatres which the Court has directed to be sold are owned or leased and operated by 54 different corporations, only 3 of which are defendants in the case. These corporations are wholly-owned in 43 cases, two-thirds owned in one case, 50% owned in 5 cases, 25% owned in one case and about 90% owned in the other 2 cases (R. 221-22). None of the 51 subsidiary companies is before the Court, and many of them are outside the territorial jurisdiction of the Court.

As of May 19, 1942, the last date for which the evidence spoke, of the theatres affected by the decree (*i.e.*, those in towns where one or more theatres must be sold) 23 were held in fee by whatever wholly or partly-owned subsidiary held them, and 32 were held under lease. In ordering the fee-held property and the leases of such companies to be sold, while refusing to take evidence about them, the Court ignored such considerations as the rights of mortgagees and other creditors, contracts with 50% and minority partners, provisions of leases which might affect the exercise of the power assumed by the Court (such as the requirement of landlord's consent to an assignment or sale of the lease), the existence or non-existence of mortgage clauses which might mature the principal in the event of sale, and all similar mundane considerations.

Such considerations were apparently not deemed relevant to the exercise of a sweeping power "to reorganize the whole set-up of the corporation" (R. 3401).

**5. The order of the Court appointing a trustee to sell appellants' theatres was particularly improvident, and far beyond the discretion of the Court.**

The Court's order appointing a trustee to conduct the sales of appellants' theatres "as rapidly as possible upon such terms and to such purchasers as this court may approve" (R. 3466) was based upon an unfair, and in fact a vicious, attack by Government counsel on Schine's failure to dispose of all the theatres named in the consent order.

Schine had complied fully with the provisions of that order, which required it to offer the fees of 3 theatres, the leaseholds on 12 others and a 50% interest in a thirteenth leasehold to the persons from whom such interests had been

acquired, or to the last operator of the theatre, for the amount of Schine's capital investments in the respective theatres; and which further required Schine, in the event such offers were not accepted, to make similar offers to independent exhibitors for the same purchase prices and upon fair and reasonable terms and conditions, including payment of brokers' commissions (R. 259). There were provisions in the order for reports and compliance, and the Court reserved the right to make further orders, but it was provided that "no order shall be made which will require the consenting defendants to dispose of any theatre interest at less than the capital investment therein as set forth in said schedules A and B" (R. 260).

The offers to the owners or previous operators were made as required. Only 2 of them took up the offers. The order, and the monthly reports filed by Schine pursuant thereto, received wide publicity in the various trade papers. In addition, appellants advertised in those papers, offering the properties for sale (R. 276-85, 2989). At the time of presentation of the Government's plan of reorganization, all but 6 of the 16 theatre interests had been disposed of; and an additional theatre, the Memorial, in Mt. Vernon—which Schine had been unable to dispose of—was given up when the lease expired at the end of 1945. All that remained when the Government's Plan of Reorganization was filed were 5 theatres (including one where Schine's interest was 50%) that nobody wanted to buy at Schine's cost.

The Government's contention that "Even if now reconciled to the court's decision, the defendants' prior failure to perform a bargain which they themselves made is conclusive evidence that under no circumstances may the execu-

tion of a plan be left to them," was an unfair attack, made without the slightest basis (R. 3238).

It is, nevertheless, the sole basis for the unprecedented order for the seizure of appellants' properties by the Court, their sale by a trustee and the impounding of the proceeds of sale (R. 3466-67).

No such relief has ever been granted, so far as we know, in a case under the Sherman Act. The granting of such relief is inconsistent with the theories of relief as expounded in previous Sherman Act cases (*Standard Oil Co.* v. *United States*, 221 U.S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106), and with the principles that govern the appointment of receivers or trustees in equity cases, (*Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479; *Strickland* v. *Peters*, 120 F. (2) 53).

**6. The order of the Court was especially arbitrary as it applied to the sale of theatres remaining undisposed of under the consent order of May 19, 1942.**

Misconstruing the nature and effect of the consent order, the Court included in the order of divestiture the five theatres named in the consent order, for no other or better reason than that they were named in that order.*

The arbitrary character of the order of divestiture in this situation is well illustrated by the case of the Strand Theatre in Cumberland, Md. In March, 1944, after it had become obvious that the Strand was unsalable at the amount of Schines' investment therein, one of the competing exhibitors in the town went to the Assistant Attorney

*In the case of Malone where Schine had 2 theatres, the order of divestiture gave Schine an option to relinquish either the Plaza Theatre named in the consent order, or the other theatre which Schine had operated since 1926.

General in charge of the Anti-Trust Division and asked permission to sell his theatre, the Liberty, to Schine. The Assistant Attorney General wrote to Burke, the exhibitor, as follows (R. 330):

> "* * * as explained to you, we will have no objection to the purchase of this theatre provided it is submitted to and approved by the court."

When the matter was presented to the Court, Government counsel, in spite of the official position of the Department, opposed the application and brought in as a witness Mrs. Grace Fisher, who operated the other first-run theatre in Cumberland.

Mrs. Fisher, however, testified that she had no objection to Schine's acquiring the theatre; that she had put in a bid for the theatre when she thought that it was going to be bought by Warner, but that she had withdrawn the bid when she learned that Schine was the prospective buyer. She also testified that Schine had never bought pictures on first run from the distributors whose product she had been buying on first run before Schine came into the town (R. 380, 382).

After hearing the evidence and argument, the Court on May 31, 1944, entered an order approving the sale of the Liberty Theatre to Schine. At the same time he directed Schine to continue to make all reasonable efforts to dispose of the theatres named in the consent order and then remaining undisposed of; but he ruled (it having been pointed out in the argument that in certain instances the properties had substantially increased in value) that Schine should "not be held strictly to the terms of sale provided in the order of May 19, 1942"; and he also granted a stay, pending further order of that part of the consent order

which related to the Strand Theatre in Cumberland (R. 426-246).

At the same time the Court denied a motion which the Government had made (R. 426) for an order appointing a trustee to sell the properties remaining undisposed of under the consent order.

Schine then continued its efforts to sell the remaining theatres; and during the summer of 1944, the trial having already commenced, it was successful in disposing of 4 of the 10 not previously disposed of. Such sales were approved by the Court (R. 2988-89). The lease on another one of the theatres expired and was not renewed, so that at the date of expiration of the consent order (Nov. 19, 1944) 5 theatres remained unsold. With the expiration of the consent order, there was no longer any obligation upon Schine to dispose of those 5 theatres, and the fact that they were named in the consent order became irrelevant and had no relation to the issue presented in the final decree.

Nevertheless, the Court in the order of divestiture has ordered those theatres to be sold, including a theatre in Cumberland—the very town in which Schine was allowed to acquire a second theatre by order of the Court—and as to which the Court's stay operated until the expiration of the consent order. In other words, Schine may keep the second theatre in Cumberland, as to which the Court found there would be no adverse effect on competition in Cumberland if Schine had two theatres there, instead of one (R. 420-21; order approving acquisition); but the original Schine theatre in Cumberland is to be sold by a trustee, "to the end" that it "may operate in competition with" the theatre acquired with the Court's approval (R. 3466).

Nothing could better illustrate the slap-dash manner in which the Court has undertaken to "reorganize the whole setup of the corporation" (R. 3401).

It is submitted that the order of divestiture should be reversed on the ground that the lower Court abused its discretion in all the respects mentioned in this Point I, and because divestiture is not an appropriate remedy in this case.

## Point II.

**BOTH THE FINDINGS AND THE JUDGMENT OF THE COURT ARE VITIATED BY ERRONEOUS RULINGS WITH RESPECT TO THE ADMISSION AND THE EFFECT OF EVIDENCE.**

The relevant assignments of error are Nos. 65-99, 114-115, 121, 124 (R. 3490-99, 3502-06, 3507).

### The Conspiracy or Conspiracies

The lower Court found, in accordance with the allegations of the complaint (R. 48-49), that appellants conspired "with each other and their affiliated corporations and with each of the aforesaid major film corporations" for purposes violative of the Sherman Act (R. 3226). There is no finding that the distributors combined among themselves for such purposes. The Court found, in accordance with the theory upon which the Government based its case (R. 486-87), that there were 9 supposed conspiracies, viz.,

> One conspiracy by Schine Chain Theatres, Inc. with its officers, directors and subsidiary companies;
>
> One conspiracy by Schine with each of the 8 large distributors.

With respect to the supposed conspiracy among the appellants themselves, and to which the distributors were not parties, the Court thought that the *Crescent* case was a precise authority, and said of that case (R. 3071):

> "Sustaining the action, the court necessarily held the Circuit is not in essence a single exhibitor; and that there can be concerted action between a corporation and its wholly-owned subsidiaries; * * *"

But the *Crescent* case did not hold that there was a conspiracy in violation of the Sherman Act between a corporation and its wholly-owned subsidiaries, because the *Crescent* case did not involve that issue.

We know of no precedent for the proposition that a corporation can conspire with its subsidiary companies to restrain trade, or that it can conspire with its officers and directors to the same end. The officers and directors are merely agents for the corporation; and in the present case no act or offense was charged to the individual appellants in the Court below in any capacity except as officers and directors of the corporate defendants.

With respect to wholly-owned subsidiary companies, while they may serve to insulate the parent company from liability on leases and mortgages, and to conform to local requirements with respect to the holding of title to real estate, and while for many purposes their identity is separate and distinct from that of the parent company, they can hardly be regarded from the standpoint of the Sherman Act as having separate and independent wills, so that their coming together with the parent company in a common purpose can create a conspiracy.

This is sufficiently clear from the testimony in the case and from the findings. No witness purported to distinguish Schine Chain Theatres, Inc. from its subsidiaries, or to attribute this or that act to any subsidiary. The subsidiaries, in fact, were never mentioned in the testimony as having done anything, or said anything, or been responsible for anything; and the findings simply lump all the appellants together, using the term "the Schine defendants" or "Schine"—the latter in the singular number.

It is submitted that the charge of conspiracy among the appellants to restrain trade and to monopolize is a charge without legal content. "The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination", per Sanborn, *J.* in *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737.

There was but one will and one authority among the appellants; that was the will and authority of appellant Schine Chain Theatres, Inc., acting through its officers and board of directors and its corporate instrumentalities in the various States and the towns therein.

For that reason if for no other, proof of a conspiracy or conspiracies between Schine and one or more of the distributors was an essential part of the Government's case. On that issue the Court found (R. 3080):

> "Proofs connecting the distributors with certain of the aforesaid acts of defendants come from the provisions of the franchise agreements and acts of the distributors, inter-department communications of the distributors and statements made by their authorized representatives, of which numerous ones have been set forth herein."

But the franchises and other agreements between the distributors and the appellants cannot prove a conspiracy. Quite the reverse. The question before the Court, with respect to such agreements, was *whether they were* entered into pursuant to a common undertaking, plan or purpose to exclude competitors from the towns in which Schine was operating.

The use of franchises and license agreements was industry-wide. They provide, in and of themselves, no basis for

a determination that the appellants exerted the pressure of superior buying power to force the distributors into a conspiracy. They are at least equally consistent with the view that the pressure came from the distributors and was exerted for their own purposes and benefit, or that there was no pressure, but merely the acceptance of a general trade practice.

Even if the franchises were found to violate Section 1 of the Sherman Act, because their necessary effect was unreasonably to restrain trade, that would not make the parties to them parties to a conspiracy to restrain trade or monopolize, without proof of intent. This the Court recognized (R. 3073-74).

The other "proofs" which the Court found to connect up the distributors in a conspiracy with appellants were "acts of distributors, inter-department communications of the distributors and statements made by their authorized representatives, of which numerous ones have been set forth herein" (R. 3080).

It is those acts and declarations of employees of distributors to which the errors dealt with in this Point II relate. There were two errors of a most serious character:

1. The Court received in evidence a large number of inter-office memoranda written by employees of distributors to one another and letters written by such employees to exhibitors other than Schine, and also a considerable amount of oral testimony concerning statements made by employees of distributors, which were not addressed to or made in the presence of appellants and were not in furtherance of any common undertaking or conspiracy independently proved, and the Court accepted such evidence both as proof of the

alleged conspiracies and as proof of the truth of the statements contained in such declarations, without any opportunity for appellants to cross-examine the persons who made them.

2. The Court held that the failure of appellants to call as witnesses a larger number of agents of the distributors was in itself evidence against appellants "of the most convincing character" (R. 3084), thus wholly misunderstanding and misapplying the decision of this Court in *Interstate Circuit* v. *United States, supra*, at 225.

The admission of evidence under the declarations rule, as an exception to the hearsay rule, is governed by 4 principles which have been clearly laid down by this Court.

1. Before the declarations of an alleged co-conspirator can be received as evidence against a defendant, the existence of the conspiracy and the defendant's relation to it must be proved by independent evidence. Neither the conspiracy itself nor the alleged co-conspirator's relation to the conspiracy can be proved by the declarations themselves. *Glasser* v. *United States*, 315 U. S. 60, 74, 75; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249; see also *Fiswick* v. *United States*, 329 U. S. 211, 217; *Logan* v. *United States*, 144 U. S. 263, 309; *United States* v. *Goodman*, 129 F. (2d) 1009, 1013; *Milmer* v. *United States*, 57 F. (2d) 506, cited with approval in the *Glasser* case.

2. Acts of alleged co-conspirators and their statements to third persons, made in the defendant's absence, are admissible against him only if performed or uttered in furtherance of the objects of the conspiracy. *Pinkerton* v. *United States*, 328 U. S. 640, 646-48.

3. More specifically, such acts and declarations must be in furtherance of the conspiratorial undertaking as the defendant understood it. See *Fiswick* v. *United States, supra,* 320 U. S. at 648; *United States* v. *Peoni,* 100 F. (2d) 401, 403.

4. Admissions or narrative statements of past events are never in furtherance of the objects of the conspiracy, and so are never admissible against anyone except the person who uttered them. *Pinkerton* v. *United States, supra,* 328 U. S. at 646-47; *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 498-99; *Wiborg* v. *United States,* 163 U. S. 632, 657-58; *Vicksburg & Meridian Railroad* v. *O'Brien,* 119 U. S. 99, 104-05; *Beaver* v. *Taylor,* 68 U. S. (1 Wall.) 637, 642; *Barreda* v. *Silsbee,* 62 U. S. (21 How.) 146, 164-65.

The above rules result from basic principles of the law of agency. As was said in *United States* v. *Lekacos,* 151 F. (2d) 170, 172:

> "The acts and declarations of confederates, past or future, are never competent against a party except in so far as they are steps in furtherance of a purpose common to him and them. Declarations are no different from other acts; they become competent only when they are uttered in order to accomplish the common purpose. * * *"

The situations in which declarations of one *proved* co-conspirator are not admissible against another one were summarized by this Court in the *Pinkerton* case (328 U. S. at 647-48) as follows:

> "A different case would arise if the substantive offense committed by one of the conspirators was

not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. * * *"

The principal contested issue in this case was whether the appellants combined and conspired with distributors to deprive competitors of product. There is little conflict in the evidence as to what pictures the distributors actually sold to Schine or what they sold or did not sell to competitors. The question is: Did the distributors act as they did because it was in their interests to do so, or because they were parties, willing or unwilling, to a conspiracy to put Schine's competitors out of business or reduce them to a status where their competition would not be effective?

For the purpose of connecting the distributors with the alleged conspiracies the Court relied on:

(a) Letters and memoranda out of the distributors' files pertaining to Schine, which Government counsel had obtained from the distributors prior to the trial, and from which they had culled, and offered at the trial, a large batch of material; and

(b) Testimony of competitors concerning conversations with employees of distributors.

The letters and inter-office memoranda related largely to clearances, as to which appellants and the distributors appear to have been often in disagreement—as might be expected, because of the different interests that a distributor and an exhibitor have in matters of clearance. *United States* v. *Paramount Pictures, supra* (66 F. Supp. at 343).

The oral testimony consisted principally of explanations, by district managers of distributors and their local salesmen, of reasons for their company's failure, refusal or inability to provide a particular exhibitor with a particular run of product that he wanted to buy, the statement usually being that Schine had bought that product on that run.

With respect to appellants all this evidence was hearsay, not binding upon them and not admissible against them because there was no independent proof of the conspiracy. The nature of the hearsay that was found to connect up the distributors with the 8 supposed conspiracies is enough to show the soundness of the rule that requires the existence of the conspiracy, and the alleged co-conspirators' connection with it, to be proved by evidence *aliunde*.

For example, the following is accepted by the Court as proof of unreasonable clearance in the Schine contracts:

> "Sussman, of Fox, wrote to Grassgreen [also of Fox]* that the 60 day clearance in Glens Falls and elsewhere seemed excessive. Sussman went on to comment that he noted that 60 day clearance was given over second run at Malone when Fox had no second run in Malone, and furthermore, as previously stated, 60 days over second run seemed excessive. Grassgreen replied that while the 60 days at Glens Falls might seem excessive, Lynch insisted upon it. Grassgreen said that Schine insisted upon the 60 day clearance because they wanted to be consistent with their demands for 60 days over subsequent independent runs. (Opinion, R. 3082; Finding 17, R. 3222).
>
> * * * * * * * *
>
> "* * * The Fox home office wrote its branch with reference to Glens Falls, second run: 'I note

*Matter in brackets ours.

that you have changed the clearances hereby providing for sixty days over third run Glens Falls. Sixty days clearances here and elsewhere seem to be excessive.', and to this the branch manager replied that Schine always provided for this clearance over third run and 'George Lynch insisted in carrying it through for the future.'" (Opinion, R. 3083; Finding 26, R. 3224).

The above examples are fairly illustrative of the extent to which the trial judge relied upon hearsay narrative statements as proof of facts.* Out of the 21 findings (Nos. 8-28) which deal with alleged unlawful action by appellants and by the distributors, at least 11 rest wholly or in part on the hearsay testimony (Nos. 8, 9, 11, 12, 13, 17, 18, 19, 21, and 26).

The use of the hearsay statements thus improperly admitted was not limited to the particular assumed conspiracy in connection with which they were claimed to have been made,** nor was it limited to the 8 alleged conspiracies between the appellants and the distributors. On the contrary, such evidence was resorted to and accepted generally by the trial judge as proof of the appellants' acts, statements, purposes and policies and of the unreasonableness, impropriety and unlawfulness thereof. It was read into the alleged underlying conspiracy among the appellants to re-

*With respect to some of the correspondence of employees of the distributors, the Court in admitting it ruled that it "be strictly construed" (R. 3089); nevertheless, in its opinion and findings, it treated that correspondence as fully probative of all statements therein contained, and as a proper basis for all inferences that might be drawn from such statements.

**A declaration received in support of one conspiracy is not proof of another, even though the two conspiracies are related. *Kotteakos* v. *United States*, 328 U. S. 750.

strain trade in and to monopolize the motion picture theatre business, though none of the distributors was claimed to be a party to that conspiracy.

The damaging effect of the receipt of such evidence cannot be avoided or mitigated by treating the 8 alleged conspiracies between the appellants and the distributors as unnecessary to the decision. As stated, proof of such a conspiracy was an essential part of the Government's case, and what is more, the evidence was heavily relied on by the trial judge as proof upon contested issues of fact underlying the entire case, upon which the decision, the judgment and the relief granted necessarily rest. The Court in its opinion stated (R. 3073-74):

> "There is a conflict in the testimony in many of the situations. The court recognizes the burden is cast upon the plaintiff to establish this cause and/or causes of action by a fair preponderance of the proof. It is quite patent from the nature of the charges here that they have to be established by numerous acts and transactions having relation some way to the charges. These acts must be considered together to show intent, and intent 'to combine', 'conspire' and/or 'monopolize' must be reasonable and natural conclusions from the acts or transactions, as believed by the court."

In the *Glasser* case, this Court said that, if a declaration of alleged co-conspirators were received as proof of both (a) the existence of the conspiracy and their connection with it and (b) the truth of the declarations themselves, the result would be that "hearsay would lift itself up by its own bootstraps to the level of competent evidence" (315 U. S. at 175). The Trial Court not only did that, but made

clear that it was doing just that. The Court expressly stated that it was using the declarations of distributors' employees to connect up the conspirators with the alleged conspiracy; and it further stated that the crucial finding of intent was being made on the basis of all the evidence, including such declarations; and in its findings it quoted at length from those declarations and obviously accepted them as fully probative.

Most of the declarations so relied on were mere narratives of past events, inadmissible under the fourth principle of law above cited. Many of them (and most of those relating to clearances) were also inadmissible under the second principle cited, because they were not in furtherance of any common undertaking between Schine and a distributor but were statements criticizing or objecting to contract terms that Schine wanted—the very opposite of a declaration in furtherance of a conspiracy.

**Misapplication of *Interstate Circuit* case**

In its opinion, after 3 pages of recitals of hearsay evidence, the Court said: "There is much other evidence going to show the influence of 'Schine' with the distributors to gain preference over independent competitors and also the cooperation of the distributors with 'Schine' to the same end" (R. 3084). In spite of the fact that such "other evidence" also was largely hearsay, the Court made the following ruling (R. 3084):

> "Sales managers for each of the major distributors who had authority to approve film leases, called by the defendants, gave testimony, in substance, that to their knowledge there has not been any conversations with any defendants or their executives or

employees not to deal with any competing exhibitors to restrict the terms of such dealings. *These sales managers can be only a small number of those employed as such during the period in question and they speak only of their own knowledge.** Some six branch and exchange managers have testified as to transactions in contradiction of the plaintiff's proof as to five of the situations in question. In Interstate Circuit v. United States, supra, the court said that the failure to call those officers who had authority to act for the distributors and were in a position to know whether they acted in pursuance of an agreement 'is itself persuasive that their testimony, if given, would have been unfavorable to appellants.'"

The Court added:

"While that case was stronger with respect to the proof in this connection, the defense herein is weakened both by the failure to call others of the officers authorized to act and by the nature of the testimony given by these. 'The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. * * * Silence then becomes evidence of the most convincing character.' Interstate Circuit v. United States, supra."

The Court completely misunderstood and misapplied the *Interstate Circuit* case. In that case, unlike the present case, the distributors were defendants. There the manager of a chain of first-run theatres had written a letter to a representative of each of the 8 large distributors, demanding that certain restrictions be put upon theatres playing the same pictures on second run, and each of the distributors

*Italics supplied.

had proceeded to impose such restrictions. The particular question was whether the trial court's finding that the distributors had engaged in concerted action could be sustained. This Court held that an inference of conspiracy could properly be drawn from their unanimity of action, in the absence of any denial of concerted action by any officer or agent of any of the distributors who knew, or was in a position to know, whether in fact each distributor had acted separately, or whether they had reached an understanding for concerted action (306 U. S. at 232).

In the present case there was no such circumstance as the unanimity of action in the *Interstate* case, which could have been the basis of the inference of the type drawn in that case. Moreover, insofar as there was any basis for an inference that any acts of Schine or the respective distributors, affecting competing exhibitors, were the result of a common plan of action by, or agreement between, Schine and such distributors, appellants called as witnesses those who were in a position to testify of their own knowledge as to the existence or non-existence of such a common plan or agreement.

Specifically, appellants called J. Myer Schine, founder of the circuit and ranking executive of the corporate appellants, and one or more representatives of each of the distributors, all of whom were concerned with the sales policies of the respective companies, and all of whom must necessarily have known whether such a common plan or purpose existed.

Appellant J. Myer Schine, after testifying on matters within his knowledge concerning which the Government had offered evidence, expressly denied advising or requesting any representative of a distributor in any instance that such distributor should not deal with competing exhibitors,

or stating or implying that, if it did so, Schine would not do business with that distributor (R. 2697).

The witnesses whom appellants called from among the distributors likewise denied the charges of conspiracy, explained how the distributors conducted their business and that the distributors were acting in their own interests in their dealings with Schine and its competitors and not in the interest, or under the compulsion, of Schine. Those witnesses included:

Ned E. Depinet, President of RKO, who had formerly been Sales Manager for Universal and previously Vice-President of First National (one of the two distributing companies of Warner) (R. 2857).

William F. Rodgers, Vice-President and General Sales Manager of Loew's, who had been employed by that company or its predecessors since 1920 (R. 2876).

Gradwell LeB. Sears, Vice-President of United Artists, formerly Branch Manager for First National and Warner (R. 2917).

Andrew W. Smith, Jr., Eastern Sales Manager for Fox, who had previously been General Sales Manager for RKO, General Sales Manager for United Artists, General Sales Manager for Warner and an Eastern Branch Manager for Pathe (R. 2782).

Herman Wobber, Division Manager for Fox, who had formerly been a Division Manager for Paramount for 20 years (R. 2902).

Frank J. A. McCarthy, Southern and Canadian Sales Manager for Universal, formerly General Sales

Manager for Fox, Special Representative for Paramount and Manager for First National (R. 2908).

Neil F. Agnew, Representaive of David Selznick (an independent producer), Vice-President of Vanguard Film Company and formerly General Sales Manager for Paramount (R. 2926).

It would be difficult to find a more impressive list of witnesses to speak for the sales policies of all the major distributors.

Clearly the above witnesses, within the meaning of the *Interstate Circuit* case, "were in a position to know whether they had acted in pursuance of an agreement" (306 U. S. at 226). In addition, appellants called 5 particularly qualified branch managers and salesmen for several of the companies.

In spite of the direct and positive testimony of those witnesses, negativing the existence of a common plan or conspiracy between Schine and any distributor, the Court accepted the hearsay testimony as "Proof connecting the distributors with certain * * * acts of defendants" (R. 3080).

The Court's application of the *Interstate Circuit* case had the effect of raising the hearsay, not only to the status of probative evidence, but to the status of evidence which is "of the most convincing character". (R. 3084).

**The error in the admission of evidence is substantial**

Section 269 of the Judicial Code (28 U. S. C. § 391) provides that "On the hearing of any appeal, * * * in any case, civil or criminal, the court shall give judgment after

an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." According to the sponsors of the legislation, it "affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims it."*

It is clear that the receipt of hearsay evidence may involve substantial error, and may constitute ground for reversal. In the *Kotteakos* case this Court said (328 U. S., at p. 761):

> "Moreover, lawyers know, if others do not, that what may seem technical may embody a great tradition of justice, *Weiler* v. *United States, supra,* or a necessity for drawing lines somewhere between great areas of law; that, in other words, one cannot always segregate the technique from the substance or the form from the reality. * * * Yet that narrow line, and many others like it, must be drawn. The 'hearsay' rule is often grossly artificial. Again in a different context it may be the very essence of justice, keeping out gossip, rumor, unfounded report, second, third, or further hand stories."

The error was particularly substantial in such a case as this, where not only the judgment itself, but also the character, scope and severity of the relief depended upon what the trier of the facts believed to be proved. See the *Kotteakos case* (328 U. S. at pp. 764-65).

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*H. R. Rep. No. 913, 65th Cong., 3rd Sess. 1, quoted in *Kotteakos* v. *United States,* 328 U. S., at p. 760.

## Point III.

**THE FINDINGS OF THE TRIAL COURT ARE NOT SUPPORTED BY THE EVIDENCE AND ARE INSUFFICIENT TO SUPPORT THE JUDGMENT.**

The relevant assignments of error are Nos. 64 to 114, 116 to 119, 123 to 208 (R. 3489-3502, 3505-25).

This point is argued in full awareness of the principle that the Court will not disturb a finding of fact merely upon the ground that it is against the weight of evidence, and that a finding of fact by a trial court will be set aside only if (1) it is not supported by substantial evidence and is manifestly wrong, (2) it is against the clear weight of the evidence, (3) it discloses that the lower court has acted upon an erroneous concept of the law, or (4) it is insufficient because of the failure of the trial court to make other essential findings. *Interstate Circuit, Inc.* v. *United States, supra; Morley Co.* v. *Md. Casualty Co.*, 300 U. S. 185; *Harkin* v. *Brundage*, 276 U. S. 36; *Lawson* v. *United States Mining Co.*, 207 U. S. 1; *Collier* v. *United States*, 173 U. S. 79.

We believe that, of the Court's 32 findings of fact in the present case, all but the first 6—the introductory findings*—and the last 5 (Nos. 28-32) are vulnerable to attack on one or more of the grounds cited above.

Furthermore, our position does not rest upon the setting aside of any particular finding or findings of fact. The Trial Court's adverse judgment is based upon a conclusion of conspiracy, for which "motive" is essential, and which, as the Court said (R. 3073-74) had to be "established by numerous

*The last sentence of Finding 3 is also contrary to fact and contrary to the evidence.

acts and transactions having relation someway to the charge", which "must be considered together to show intent" and must be "the reasonable and natural conclusions from the acts and transactions, as believed by the court", based primarily on "circumstantial evidence and the inferences" to be drawn therefrom.

In other words, the conclusions of motive and conspiracy were based upon all the evidence and findings. Therefore when it appears, as it does, that the most important findings—on the most important issues—are literally riddled with factual error, the conclusions of motive and conspiracy cannot stand, because of the influence which such errors must have had on the mind of the Court.

The first six findings identify the defendants and give certain facts about the business (R. 3212-14). Finding 7 relates to the "buying power" of Schine. Our objections to it are stated at the end of this Point.

Finding 8 contains the Court's conclusions of fact with respect to violations of the Sherman Act. Findings 9 to 27 are specific recitals in support of those conclusions. It is stated in Finding 8 that the "means and methods employed by the different defendant corporations through their officers and authorized representatives to obtain a 'monopolistic' control are numerous", and the methods "principally" used are listed. Findings 9 to 27 will be discussed under the headings of that list, as follows:

1. Arbitrarily depriving independents of first and second run pictures.

2. Securing unreasonable clearances.

3. Making threats to build or open closed theatres to prevent construction or operation by independents.

4. Lowering admission prices.

5. Obtaining rental concessions.

6. Restricting independents who sold to Schine as to periods and places of operation.

7. Making long-term franchise agreements covering the "circuit".

**1. "Arbitrarily depriving independents of first and second run pictures".**

The relevant Findings are 9(a), 12, 13, 18, 19, 21 and 24.

Finding 9(a) is to the effect that Schine "arbitrarily deprived independents" of product which they had previously enjoyed. Finding 18 cites instances where distributors "refused to negotiate with the independent for runs not bought by Schine". Finding 19 gives instances where "distributors refused to negotiate with the independent" for runs that were bought by Schine. Finding 21 refers to "tying up second runs".

Finding 12 states that "after 'Schine' opened a theatre within a town, it was arbitrarily able to keep the independents from operating a theatre in the town with suitable run product, as in Auburn, Lockport, Mt. Vernon, Paris and Bellefontaine. The specific situations in the named towns are dealt with in the analysis of Findings 9(a), 18 and 19, and there will be no separate heading for Finding 12.

Finding 13 is to the effect that Schine was able "to monopolize first-run product" in 3 towns and "first neighborhood run in Rochester, even though the physical facilities of the independents were better". The instances cited will be dealt with where the towns are discussed in connection with Findings 9(a), 18 and 19.

Finding 24 refers to a specific occurrence in Bellefontaine, O., and will be discussed where that town is dealt with in connection with the last 2 sentences of Finding 9(a), which refers to the same situation.

In order to realize how utterly erroneous were the findings that Schine had "arbitrarily deprived" some exhibitors of product, it is necessary for the Court to understand certain characteristics of the market in motion pictures and the unusual theory advanced by the Government with respect to this charge.

The Court below did not find that, because of Schine's activities, any exhibitor was unable to obtain a sufficient number of *some run* of motion pictures to operate his theatre. All the Court has found was that in certain instances certain exhibitors were not able to obtain the particular run of particular pictures that they would have liked to get for their theatres. Of course, it needs no argument to demonstrate that if exhibitor A plays a certain distributor's pictures first-run in a certain competitive area, no other exhibitor is going to be able to play the same pictures on the same run in that area. In that sense, all other exhibitors in the area are "deprived" of first run of those pictures.

However, it cannot reasonably be argued that such deprivation was *arbitrary* on the part of the exhibitor who bought the run, unless it can be shown that he bought it, not because he needed the pictures to show in his own theatre, but because he wanted to keep them away from some other exhibitor. But the Court made no finding that Schine had ever engaged in such a practice, and the evidence is clearly to the effect that, whatever pictures Schine bought for any particular theatre, it played in that theatre. It did not buy pictures to put them on the shelf and keep them away from competitors.

In the very nature of the motion picture business it is inevitable that there will be some competitive areas in which the entire output of the 8 large distributors will not be sufficient to enable every theatre operating within the area to play the run of those pictures which the owner would select if he had his unlimited choice.

The opinion in the *Paramount* case shows that the producer-distributors rely upon the large theatres in heavily populated areas for by far the major part of their income, and that it is unprofitable for them to make a picture unless it has a reasonable chance of being exhibited in the large theatres in the large cities. Though it may at first glance seem paradoxical, it is the fact that the more heavily populated the area in which a theatre is located the fewer number of pictures it will need to operate successfully. Thus the Radio City Music Hall in New York City, the largest theatre in the largest metropolitan area in the world, uses fewer pictures than any other motion picture theatre in this country operating on a regular schedule.

On the other hand, a motion picture theatre in a small community must change its program frequently because, in order to operate at a profit, the theatre must attract the same customers much more frequently than would be the case in a thickly populated community, where there are more potential customers per seat.*

*An examination of the picture licensing contracts in the record will reveal that, in general, the smaller the town in which a theatre was located, the larger the number of pictures Schine played in that theatre. For example, in such a place as Bath, N. Y. (a one-theatre town), Schine contracted to exhibit pictures for a maximum of 2 days (Ex. P-174, R. 5835, 1170); in larger towns, such as Amsterdam and Gloversville, the number of days that the pictures were to be played was usually 4 (Ex. P-197, R. 5897, 1170; Ex. P-206, R. 5866, 1170); whereas in a town the size of Lexington, with a population of approximately 50,000, the contracts called for playing pictures up to 7 days (Ex. P-185, R. 5846, 1170).

It is for this reason that the large producers make their pictures with an eye to the heavily populated markets, and cannot afford to make more pictures than those markets will support. None of the major producers could afford to make the number of pictures that it could sell in the smaller communities, at the prevailing scales of picture rentals. That is the reason why the smaller, so-called independent, producers have catered largely to the smaller towns. Wholly apart from subsequent runs of product of the larger producer-distributors, the independent producers have always afforded a large supply of pictures for the smaller towns, where in many instances their product—for example "Westerns"—is more popular than some of the majors' pictures.

**FINDING 9(a)**

Finding 9(a) (R. 3215-16) states that Schine "arbitrarily deprived independents"* of product that they had previously had in certain towns in certain years, and that Schine, having secured such product, retained it and the independent was unable to get it for subsequent years. It then recites evidence concerning two particular situations.

The following lists in chronological order the specific instances given by the Court in Finding 9(a) as cases where independents were "arbitrarily deprived" of first-run product which they had previously enjoyed and, in three cases, of second-run product:

*It may be noted that the Court's use of the term "independents" is different from the general usage in the industry. The term generally means a theatre operator not affiliated with one of the major producer-distributor chains, and in that sense Schine is as much of an "independent" as any of its competitors not so affiliated. In the findings, however, the Court defines the term as meaning "Schine's competitors" (Finding 3, R. 3213).

1930-31 season—Loew's product in Bellefontaine
1933-34 season—RKO in Auburn
1934-35 season—Warner (second-run) in Watertown
1935-36 season—Fox, Loew's and Paramount in Van Wert
—Fox and Paramount in Bucyrus
—RKO and second-run Loew's in Norwalk
1936-37 season—Columbia, United Artists and Warner in Norwalk
1938-39 season—Columbia second-run in Rochester
1941-42 season—Warner in Harlan, Ky.

In none of the above instances does the evidence support the Court's finding, assuming that the word "arbitrarily" in the finding has any meaning. In each instance Schine contracted for product of a distributor whose pictures a competitor had played in a previous year or years; but in no instance was it shown that the product so bought by Schine was not needed by it for the operation of its theatres, or that it was obtained by any unfair means used against the competitor, as an analysis of the situations will show.

**1930-31 season—Loew's product in Bellefontaine**

In this instance Findings 9(a) and 19 both refer to the same facts.

In the year before Schine entered the town there were 3 theatres, all owned by the same individual and all leased by him to another individual, as follows:

(a) The Opera House, 75 years old, with 680 wooden seats and no sound equipment. It had never

been open since 1924 except on Saturday nights (R. 1414-16).

(b) The Majestic, an old theatre seating 250 persons. It had never been open since 1924 except during the County Fair (R. 1413-15).

(c) The Strand, an "ordinary theatre" seating 480 persons, which was in operation (R. 1416).

In the year before Schine built a new theatre in the town, Mooney, as lessee of the three old theatres, made a profit of about $10,000 (R. 1445-46).

Bellefontaine, a city of 9,500 population, was not well served with motion picture theatres, when its only theatre that was open had but 480 seats. Schine took advantage of the business opportunity thus presented by entering the town in 1930 and building a new and modern theatre of brick and steel construction, having the latest equipment and seating 1,400 persons. It was called the Holland and was designed to give a Dutch atmosphere (R. 2670). It was opened on February 1, 1931; and, for the balance of the 1930-31 season, it played pictures from among those which the Strand had not contracted for (R. 1365). There is not the slightest basis for the Court's statement that Schine deprived the Strand of pictures, arbitrarily or otherwise, during the 1930-31 season.

From the time of the opening of the Holland, Mooney began to lose money; which was not unnatural, considering that he was carrying 3 theatres and operating only one, which had only 480 seats, as compared with 1400 for the Holland; and that business conditions were bad in Bellefontaine in 1931 (R. 1442,1446).

Because there is no evidence whatever that Mooney was unable to get the product that he wanted in the 1930-31 season as the Court found, we assume that the Court made a typographical error and intended to refer to the 1931-32 season, with respect to which there is some evidence of Mooney's efforts to buy pictures. Specifically, there is evidence that he applied for Loew's pictures for that season and was told that they had been sold to the new Holland (R. 1364).

Schine had bought them; but the record is barren of even a suggestion that Schine was actuated by any purpose except to buy and play the Loew's product in its new theatre, or that Schine used any unfair means to buy the Loew's pictures, or that it was unnatural for Loew's to prefer to put its pictures into the new and large theatre, rather than the old and small one. The Court's findings exemplify a thread that runs through the Government's case and the Court's opinion, namely, that whenever Schine entered a town and contracted for pictures, it was guilty of something wrong—something unfair—if the pictures were those of a distributor who in previous years had sold its pictures to Schine's competitor.

Bellefontaine is simply an example of old and inadequate facilities being supplanted by new and adequate ones. It is an example of the very competitive process which the Sherman Act is designed to serve.

In order to get the full picture of the situation in Bellefontaine, it should be noted that Mooney bought the leases of his 3 theatres in 1924, plus the equipment of the Strand and some other equipment, for $15,000 (R. 1417). The Strand lease ran until 1934, the others until 1931 (R. 1336-37, 1419). In March, 1931, after Mooney began to

lose money, Schine offered to buy the remaining terms of the leases for $5,000, but Mooney rejected the offer. About the first of June, however, he accepted another offer, this time for $2,500 (R. 1366-67, 1445).

Mooney testified that he had two reasons for selling the leases, (1) that he was losing money and (2) that he was afraid he could not get any first-run product for the 1931-32 season (R. 1368). The basis of his fear was that Schine had bought the Loew's first run and that the salesmen of other distributors that had previously dealt with him had not called on him during the month of May, as was customary during the previous years when he was alone in the town (R. 1367). There is nothing, however, to connect up Schine with the failure of the distributors to send their salesmen around. Nor is it surprising that, with a new and modern theatre opening in the town, the distributors' salesmen should postpone their calls on the second-rate theatre until they had found out what they could sell to the first-rate theatre.

**Second recital of evidence in Finding 9(a)**

Since it relates to Bellefontaine, we take up here the recital of evidence contained in the last sentence of Finding 9(a) (R. 3126), as follows:

> "In 1932 Lynch wrote Flynn a letter saying, among other things: 'I want you to refrain from selling him (independent) any pictures whatsoever.' and Metro through Flynn agreed not to do so. Lynch also wired Fox to withhold selling to this independent and wrote Fox' agent saying: 'Have also asked him (Schmertz-Fox' agent) to refrain from selling this man second run' " (R. 3216).

The communications referred to are Ex. 412, R. 3907, 2604; Ex. 163, R. 3798, 2605; Ex. 171, 3804, 2605. What they show is as follows:

When the lease of the Opera House ran out at the end of 1931, Schine did not renew it. Thereafter, according to the correspondence above referred to, the Opera House was taken on a short-term lease by Moller, whom Schine had discharged as the manager of the Holland. Moller interested two local people in reopening the Opera House and embarked on a trade war against Schine, including a newspaper campaign charging that the Holland's admission prices were too high, and that local people should patronize a local operation rather than a chain theatre. He announced admission prices of 10¢ and 15¢, children 5¢, "flooded the entire town with passes" and generally launched on a program of "economic warfare" against the theatre that he had formerly managed (Ex. 171, R. 3804, 2605; Ex. 412, R. 3907, 2604).

In this situation Lynch wrote to 2 distributors, pointing out the facts and arguing that such distributors should not lend their aid to Moller's unfair tactics by selling him their pictures. The cited exhibits show that Loew's assured Lynch it had no intention of doing so, but that Fox used the opportunity to force Schine to take 10 more pictures than Schine had bought for the ensuing season (Exs. 170-172, R. 3803-06, 2605). The remaining major distributors, so far as the record shows, did not even consider selling their pictures to Moller's fly-by-night operation; and there is no evidence that Schine had anything to do with their conduct in the matter.

The practice of opening theatres with low admission prices for the purpose of establishing a nuisance value to

existing theatres is a familiar one in the industry, and that was obviously what Moller was doing. Schwartz did the same with his Opera House in Lexington (Ex. 455, R. 3916, 2249; Ex. 457, R. [redacted]8, 2249), and Boumansour with his Plaza Theatre in Malone (Ex. D-133, R. 5176, 2305; R. 2324-26).

But even if we assume that Lynch's action was a specific restraint of trade and a specific violation of the Sherman Act, that specific violation would give no support to the general conclusions of the court below, relating to an intent to monopolize and to restrain trade. Lynch's action was not directed at competition as such. It was directed at what he considered to be—and certainly not without some justification—unfair competition (R. 3908); and the incident was an isolated one, which occurred 12 years before the trial.

**1933-34 season—RKO product in Auburn**

Finding 19 repeats the substance of Finding 9(a) under the above heading, *i.e.*, that RKO would not sell to the independent in Auburn in 1933-1934, and adds that Paramount would not sell to the same theatre operator in 1934-1935. Finding 18, without specifying any particular year, states that RKO, Fox, Paramount, MGM and Universal would not negotiate with the independent for second-run product not bought by Schine.

In 1929, Schine had a 50% interest and the Shea Circuit a 50% interest in 3 theatres in Auburn (R. 223). In the same year the theatres were leased to Fox-Metropolitan; and after the receivership of that company they reverted to Schine and Shea in 1933 (*Ibid.*). A fourth theatre, the Capitol, an "upstairs" house, was acquired by an operator named Wallace in 1931 (R. 1957).

For the 1931-32 season, RKO sold Wallace its entire product on first-run, which in previous years it had sold to the other theatres. In 1932-33, RKO "split" the product, giving half to Wallace and half to Fox-Metropolitan. In the 1933-34 season, after Schine-Shea had resumed operation of the 3 theatres in Auburn, RKO sold its whole product to Schine-Shea (R. 1961-62). Here is the evidence, as recited in the Government's brief below (Pl. Br., Appendix, p. 5):

> "After the Schine-Shea pool resumed operation of the Jefferson, Palace and Strand in 1933, Wallace never had a regular first-run RKO contract, although Wallace had been sold* and played 42 RKO features. RKO did not even solicit him for the 1933-34 product. Charles Boasberg, RKO salesman, told him that RKO had sold its full line product to Schine-Shea as part of a circuit deal made with Schine which included the city of Auburn. Boasberg advised Wallace he could not stop this deal but would give him Schine rejects. Wallace did get 3 pictures first-run which Schine had rejected. During the 1933-34 season, Schine bought the RKO product first-run at the Jefferson and Palace theatres."

This is a good example of the Government's insistence on attributing improper motives to Schine in all situations, though crediting all "independents" with laudable motives for precisely the same conduct in all similar situations. For all the evidence shows is that the theatres in which Schine had a 50% interest had purchased the RKO product prior

*The tense used makes the statement unclear. What it means is that *after* 1933 Wallace, though not having a regular RKO contract, nevertheless did get and play 42 RKO feature pictures in the seasons 1933-35 (Ex. 813, R. 5555, 1960).

to 1931-32, lost it to Wallace in 1931-32, got half of it back in 1932-33, and then bought all of it in 1933-34. In this competitive see-saw there is nothing to indicate that the means used by Schine to get the product in 1933-34 were in any way different, or more evil, than those used by Wallace in 1931-32. Schine's conduct is made "arbitrary" only by the Government's supplying an inference (without evidence) that Schine's purpose was evil.

With respect to Paramount product, the evidence shows that the Schine-Shea theatres had bought and played the first run prior to the 1933-34 season (R. 2142-43). Wallace applied for Paramount product for that season, and in his letter to Paramount he referred to the Schine-Shea theatres and said: "I appreciate the fact that they have first call on the product due to using your pictures this past year current" (Ex. D-130, R. 5173, 2150). However, when Schine-Shea and Paramount were unable to come to an agreement on terms for 1933-34, the product went to Wallace and he played the Paramount pictures first-run for the 1933-34 season (R. 2149-50).

In the following year, Schine-Shea and Paramount negotiated again, and this time they came to terms, and the product was sold to Schine-Shea rather than Wallace (R. 1962-63).

With respect to the second runs mentioned in Finding 18, Wallace testified that in 1936 and 1937 he attempted to obtain such runs from various distributors but was told that it was against their policies to sell second run in Auburn (R. 1970-76). Wallace was then playing the whole first-run product of Columbia and was obtaining various other product, including first-run and re-issues, from other distributors. Apparently he was not short of product, as he

was playing 8 pictures per week at the Capitol Theatre (R. 2150-54).

Although Wallace himself did not attempt to connect Schine with the decision of the distributors not to sell him second runs, that is the implication of Finding 18. Wallace was permitted to testify as to the reasons given to him by the various distributors for not selling second runs in Auburn. The reasons were various, but in general it had not been the practice of distributors to sell such second runs in Auburn since 1932 (R. 1965-76, 2643-45). Neither the testimony of Wallace nor anything contained in the conversations between him and the distributors suggested that the unwillingness of distributors to sell second runs in Auburn was due to anything more than a business decision based on their own self-interest. The Court failed to mention that, in case of the distributor whose whole product Wallace was buying and playing first-run, *i.e.*, Columbia, a request by Schine for the second-run was turned down (R. 2643-45).

In general, the distributors did not sell second runs in Auburn until after the opening of the new Auburn Theatre by Schine in September, 1938. As there was not then a sufficient supply of first-run product, second runs began to be sold (R. 1976).

Wallace was still running his theatre in Auburn at the time of the trial (R. 1957). In the meantime he apparently had not been deterred by the competition of Schine in Auburn, because it was he who made an offer for the Jenkins property in Canandaigua, for the purpose of putting up a new theatre on a lot adjacent to the Schine theatre there (R. 1976-77).

The finding with respect to the second-runs would be relevant in an action against the distributors. It is irrele-

vant in the present action, when the testimony does not connect Schine with the decisions of the distributors with respect to second runs.

**1934-35 season—Warner (second-run) in Watertown**

In 1934 there were 6 theatres in Watertown, a city of 32,000 population. There were 3 active theatre operators, each with 2 theatres—Graham & Ludlow, Vournakis and Schine. Schine's theatres had reverted to it in the previous year from the Fox-Metropolitan receivership (R. 2173). The situation with respect to runs in Watertown was somewhat chaotic, and up to 4th and 5th runs were sometimes played in that town (R. 2184). All that the record shows, with respect to the second run of Warner product for the 1934-35 season, is that in that season Vournakis dropped down from second run to third run, on product of which Schine had bought the first run for one of its theatres and the second run for the other (R. 2173-74).

What happened in Watertown is very simple. Schine put in a second-run policy in one of its theatres and so bought the Warner second-run product, together with another second-run product. Vournakis, in his own words, played in that season "part second and part third" (R. 2180), *i.e.*, he had some product second-run but got only the third run of that product, including Warner, of which his competitors had bought first and second runs.

Second and third-run theatres, and even fourth-run theatres, are not necessarily unprofitable theatres. They are in general the smaller and less elaborate houses, which represent smaller investments (and hence smaller carrying charges) and which buy pictures cheaply and attract the public by lower admission prices. There were 9

towns in which Schine theatres were playing on a second-run policy during the period involved in the present case.* There were 8 instances where Schine changed its policy from first-run to second-run.** If second-runs or subsequent runs meant unprofitable theatres or undesirable theatres, then the whole structure of the motion picture business—founded as it is on runs and clearance—would fall to the ground.

Reduction of a theatre from first-run status to second-run, or from second-run to some subsequent run, is to be expected from the normal forces of competition in a competitive business. That anything other than normal competitive forces were operating in Watertown in 1934-35 is not shown by the record.

Vournakis was still in the theatre business in Watertown when the case was tried, 10 years after the incident referred to in the Court's findings (R. 2172-73).

**1935-36 season—Fox, Loew's and Paramount product in Van Wert**

Under this heading we will also deal with the portion of Finding 19 which relates to Van Wert, namely,

> "* * * MGM would not sell * * * 1935-36 in Van Wert; * * * United Artists would not sell 1935-36 in * * * Van Wert; * * * In these instances, when the independent attempted to make ap-

*Amsterdam, Piqua, Cortland, Glens Falls, Kent, Lexington, Oswego, Mt. Vernon and, for a time, Fostoria and Kent.

**Auburn, Geneva, Gloversville, Lockport, Oneonta, Ogdensburg, Watertown, Corning. We have not cited record references for this or the preceding footnote, because any of the licensing contracts covering the Schine theatres will show the towns in which second runs were bought.

plication for product, he was simply advised that the product had been sold to 'Schine' in a circuit deal."

Van Wert is one of the clearest examples to be found in the record of the operation of normal competitive forces.

In 1934 there was but one theatre in operation in Van Wert, the Strand, which had been managed by the same individual, C. L. Dasher, since 1918. Being the only theatre in town it got whatever product it wanted, and in the 1934-35 season bought and played the product of all 5 major companies—Paramount, MGM, Fox, RKO and Warner—on first run (R. 651).

In October, 1934, Mr. and Mrs. Moore acquired and reopened a small store-show theatre, the Ohio, with 347 seats (R. 655-56). The Moores bought for the 1934-35 season the product of the other 3 large distributors, United Artists, Columbia and Universal, all first-run, together with some first-run pictures of "independent" producers (R. 651).

In May, 1935, Schine began construction of a new theatre, the Van Wert, with 802 seats, and it opened in August (R. 237, 651, 657).

For the 1935-36 season, Schine bought, for the new Van Wert, the product of Paramount, Loew's and United Artists, and applied for product of Fox. The Strand had bought RKO and Warner product, and also had applied for the product of Fox (R. 652-53, 658).

The operator of the Strand had had a pre-selling season conversation with a Fox salesman, in which he apparently agreed on terms for the Fox 1935-36 product, but he had not made a contract (R. 652, 654).

After Schine opened up the new theatre, Dasher was at the Fox office in Cleveland, where Schmertz, the District

Manager, called him in and said: "You've got me in a hell of a mess, * * * I have a letter from Schine. You said they weren't coming in, not to save any pictures. It looks like I am going to have to take half of it [*i.e.*, the Fox product] away from you" (R. 654).

Thus Fox decided to sell half of its 1935-36 product first-run to the new Schine theatre and half to the Strand; and the Strand, which in the previous season had purchased on first run the product of all five of the major distributors, got for the 1935-36 season the product* of Warner, RKO and half of Fox, while the third theatre, the Ohio, got Universal and Columbia (R. 657-61), together with the product of Monogram, Republic and some of the smaller companies (R. 651).

In this situation it is difficult to see what could have been in the Court's mind when he arrived at the conclusion that Schine, which was not a party to any of the dealings between Fox and Dasher, or to the dealings between Dasher and Paramount or Loew's, had "arbitrarily deprived" the Strand of the product of those distributors.

Schine took a lease on the Strand Theatre before the 1935-36 season began. How that came about was testified to by Dasher, who said that, while at a meeting in the Fox office in Cleveland, he and Schmertz had had the following conversation:

> "Then he [Schmertz] said, 'Why don't you get together with Schine, make a deal with him?' I said, 'He isn't interested in my theatre or he would

*In this instance and elsewhere, in referring to "product", we mean the first run of the product unless the context otherwise requires. In the 1935-36 season, all 3 theatres in Van Wert were playing on a first run policy.

> have come and saw me. He had plenty of time.' He said, 'If I sent him down will you talk to him?' I said I would be willing to but I would have to take it up with Mr. Evans [owner of the theatre], if he was willing to, it would be perfectly all right with me" (R. 655-56).

Two representatives of Schine later called on Dasher and Evans and, after some negotiations, agreed on a lease of the theatre to Schine (R. 656).

There is no evidence to suggest that Evans leased the Strand to Schine because Dasher could not get sufficient product in the 1935-36 season to operate the theatre profitably. On the contrary, it appears affirmatively that Dasher was able to get first runs of RKO, Warner and half of Fox, and there is no evidence either that such product was not sufficient for him or, if it was, that he did not get enough good "independent" product to make up any deficit.

What happened at Van Wert is a simon-pure case of competition, not restraint of competition; and if Evans and Dasher preferred to sell out, rather than continue to compete—in a town where for years they had had no competition—their decision can be attributed to no act on Schine's part which *restrained* competition. It must be attributed to Schine's *competition*.

Consider the realities of this situation. The operator of the town's only theatre is confronted by a small theatre opening in 1934 and a new large theatre opening in 1935—with an increase in the number of theatre seats in the town from 710 to 1,857. Is there any reason to suppose that in such a situation he will necessarily be able to buy the same distributors' product as when he had a "monopoly" in the town?

The net result of what happened in Van Wert was that a one-theatre town got the service of 2 full-time theatres and of one that was open for business at times when the demand was sufficient.

Finding 19 states that United Artists and MGM "would not sell to the independent" in Van Wert in the 1935-1936 season. This finding relates to the Ohio Theatre, which was opened in October, 1934, by the Moores, and to avoid repetition is considered together with Finding 11(d), reading as follows:

> "At Van Wert, the operator of the 'Ohio' theatre could not get first run product it had had. During negotiations for the sale of the 'Ohio' to Schine, Lazar said that Moore would have trouble getting product; Schine would have the first runs; and that Schine was interested in buying in order to raise prices."

When the Moores opened in 1934, they obtained United Artists, Columbia and Universal pictures on first run, those pictures not having been sold to the only competing theatre, the Strand. Mrs. Moore testified that she and her husband attempted to get United Artists first run again for 1936, but that she was told that the product had been sold by the New York office to Schine (R. 656-58). With respect to the MGM product, the Court appears to have been mistaken, as Mrs. Moore testified that the Ohio Theatre had that product in 1935-1936, and a letter from her husband to Fox dated June 1, 1936, was introduced into evidence (Ex. D-16, R. 5155, 708), which said, in part:

> "Metro and U.A. have given me second runs, on which I am doing nicely."

In spite of this clear evidence to the contrary, the Court found that United Artists and MGM "would not sell to the independent" in the year in question. In the same year Mrs. Moore refused an offer of 20 Paramount pictures (R. 683).

With respect to Finding 11(d), the Court correctly states that the Moores could not get the first-run product which they had had—and naturally so, since the product was taken by 2 vastly better theatres than the "store-show" that the Moores were operating. With respect to the "threat" that Lazar is charged with making—to the effect that the Moores would have trouble getting product, because Schine would have the first runs—the evidence shows that in the winter of 1936 Lazar called on Mr. and Mrs. Moore and transmitted an offer from Schine to buy their theatre (R. 673-74). If, during the course of his conversation, Lazar was rash enough to predict that the Moores would have difficulty in getting product, his prediction was never borne out by events. The evidence fully supports Mr. Moore's statement, quoted above, that they were getting all the product they needed for their theatre and were "doing nicely". The Moores were still "doing nicely" at the time of the trial.

**1935-36 season—Fox and Paramount in Bucyrus**

Bucyrus is another case of the same sort. In 1935, it had two old theatres, the State with 450 seats and the Southern with 525 seats. Each was playing product of major distributors on first run (R. 1035).

The theatre opportunities in Bucyrus were first brought to the attention of Schine early in 1935, when a group of citizens of that town called on J. Myer Schine to interest

him in completing a theatre building which another operator had started but had been unable to finish (R. 1044).

Schine investigated the situation in the town and, during the summer of 1935, made an offer for the lease of the State Theatre and acquired it in September (R. 1040-42).

Meanwhile, the uncompleted theatre building had been put up for sale at public auction in August, and Schine was the successful bidder (R. 1048-49). The previous operator of the State was hired by Schine to manage it and then to manage the new theatre, the Bucyrus, after it was opened in March, 1936 (R. 1041, 251). The Bucyrus was a beautiful modern theatre with 1097 seats—a seating capacity more than the combined capacity of the other two houses (R. 234, 1045). Schine then closed the State and in 1937 the lease was canceled and the property converted to commercial use (R. 234).

The operator of the Southern Theatre was Charnas, and it is he, the Court found, who was "deprived" of Fox and Paramount product in the 1935-36 season.

The evidence shows, however, with respect to Fox, that Charnas was offered that product on first run for the 1935-36 season but wanted it at a price lower than he had paid in the previous season, and no deal was closed (R. 1061). As Charnas said of another distributor's product that he did not buy, this was a case where "you couldn't get together on the price" (R. 1077).

With respect to the Paramount product, for which Charnas's Southern Theatre had been the outlet in previous years, the evidence shows that Charnas tried to get it on first run for 1935-36 but was told that it was not available in Bucyrus (R. 1051). The evidence also shows that the Southern was not an established outlet for Paramount product when Schine came along, but that, in fact, in two

previous seasons Charnas had refused to buy Paramount product, and Paramount had had no outlet in Bucyrus (R. 1077).

However that may be, there is nothing in the evidence to show that Schine used any improper means to obtain the Paramount product for its theatre in Bucyrus. It merely bought the product which it needed and which Paramount wanted to sell to it.

Bucyrus is simply another case where a new, large theatre is built in a town and becomes the house in which the distributors prefer to play their first runs, if the house will meet their terms. Whatever damage Charnas suffered (if he suffered any) was a normal result of the competitive process. It came from competition, not from any restraint on competition.

Charnas sold the lease of the Southern Theatre to Schine in 1937 and it has since been operated as a part-time theatre (R. 234, 244).

**1935-36 season—RKO and second-run Loew's in Norwalk**
**1936-37 season—Columbia, United Artists and Warner in Norwalk**

Norwalk is a typical story of the operation of competitive forces. A town has only one theatre, an old one, which buys the first run pictures of some or all of the distributors, to the extent of its requirements. Then a new theatre is put up in the town and, in the course of a couple of seasons, it takes the place of the previous theatre as the first-run outlet, and the old theatre becomes the second-run outlet.

In 1934, the Moose Lodge operated the only theatre in Norwalk, the Moose. It had bought and was playing on first run the product of 5 of the large distributors, viz., all except Columbia, Paramount and Loew's (R. 1027).

Then 3 individuals built a new theatre, the Forum, and opened it during the 1934-1935 season, buying and playing the product that the Moose had not bought, viz., Columbia, Paramount and Loew's (R. 1027). In July, 1935, Schine bought a two-thirds interest in the Forum and took over the management of it (R. 236).

In the 1935-1936 season, the Forum bought the product of RKO and other distributors, while the Moose bought what was left—United Artists, Columbia, half of Fox and half of Warner (R. 988). 989-90

In the following year the Forum found it profitable to buy the first runs of all the major distributors and did so, leaving the Moose in the position of a second-run theatre. The Moose had no difficulty in getting the major product on second run, except in the case of Loew's, which decided not to sell any second run in that town (R. 998).

There was nothing "arbitrary" in the "deprivation of product" which the Moose suffered, provided the better of 2 theatres in a town is permitted to buy all the product on first run that it needs and can use. The entry of a new theatre into a town—when the conditions are such that it needs a large number of pictures, and when pictures are sold according to the methods used in the 1930's—can easily result, from the operation of normal competitive forces, in reducing the old theatre to the second-run or "B" position.

That the operator of the Moose fully recognized what would be the natural and normal effect of the opening of the new Forum Theatre upon the competitive situation in Norwalk is demonstrated by the fact that after the Forum Theatre opened, and before Schine had bought an interest in it, he himself tried to buy the Forum and thus preserve his competitive position in the town (R. 1007).

**1938-39 season—Columbia second-run in Rochester**

Rochester, with a population of some 200,000, is a city in which Schine operated neighborhood houses, and the Court's finding relates to 4 Schine houses and 2 neighborhood houses of a competitor, Fenyvessy.

While the film license agreements covering Schine's theatres (the State, Dixie, Riviera and Liberty) and Fenyvessy's Madison and Monroe for the seasons 1932-39 are confused and indefinite, the general scheme in those years was that the Schine theatres played second runs, with clearance over Fenyvessy's theatres, and the Fenyvessy houses played third runs.* The specific finding with respect to Columbia's second-run product for the 1938-39 season arises from the fact that Fenyvessy obtained Columbia second-run in Rochester for his theatres in 1936-37 and 1937-38 (R. 1699-1700); and that Schine then made a 2-year deal with Columbia for 1938-39 and 1939-40 second runs; and thus obtained product that Fenyvessy had previously had.**

Up to that point the evidence is that Fenyvessy, operating theatres that ordinarily had third runs, was able to buy Columbia product second-run, which Schine had previously used, for 2 seasons, but that Schine, in turn, was able to buy the product for the following 2 seasons.

The Government's argument in the Court below was based upon the proposition that Columbia ought to have preferred to play its pictures in Fenyvessy's houses, because he would pay higher rentals than Schine paid; and that therefore Columbia was preferring Schine in Rochester, in order not to lose the overall business of the Schine Circuit.

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*Exs. 720-749, R. 5490-5519, 1674; Exs. 752-756, R. 5522-26, 1681; Exs. 757-764, R. 5527-34, 1682, 1697.

**Exs. C-102 (17)-(20), R. 4991-94, 1189.

There was no direct evidence to that effect, but the play-off records of Columbia for 2 of the 4 seasons mentioned were produced, and they showed that the returns to Columbia from the 2 Fenyvessy theatres in 1937-38 exceeded the returns to Columbia from the 4 Schine theatres in 1938-39, the respective figures being approximately $5,200 and $4,500.

But certainly the evidence does not establish that Schine "arbitrarily deprived" Fenyvessy of product merely because Schine was able to "beat down" the price structure of the distributors, and was able to buy the Columbia product for 4 theatres in 1938-39 at a lower price than Fenyvessy paid to Columbia for 2 theatres in 1937-38. For if Schine is entitled to buy the product at all, it is entitled to buy it at the best price that is obtainable by trading with the distributor, and there is no rule of law that prevents Schine from trading the price to a point lower than what the competitor has been paying.

The very essence of competition is an effort to do better than the next man. There was nothing unfair or surreptitious in what Schine did to obtain the best prices from the distributors. It was an example of successful competition, and of reduction of prices of articles moving to the public.

**1941-42 season—Warner product in Harlan**

In 1938, Schine undertook the management of the Margie Grand Theatre in Harlan, and at the same time it acquired an option to buy a one-half interest in the theatre. It exercised that option in January, 1941 (Ex. P-25, R. 3777, 830, R. 238).

There was one other theatre in Harlan, the New Harlan (R. 238). The evidence with respect to the Warner

1941-42 product, as set forth by the Government below, is as follows:

> "Coomer had operated the New Harlan in opposition to the Margie Grand since 1934. Since at least 1936, Coomer was the regular first-run customer of Warner Brothers. For the 1941-42 season, Warner and other film companies were selling their pictures as they were released in blocks of five. Without giving Coomer an opportunity to negotiate for the second block of five, Warner sold that block of five to Schine. This was also true of the third block. Coomer, therefore, made no further attempts to continue his first run of Warner product" (Pl. Br., p. 31).

What there is in this testimony which leads the Court to conclude that Coomer was "arbitrarily deprived" of Warner first-run product by Schine is indeed a mystery. The Margie Grand had been playing Warner product, and also that of Universal (among others), when Coomer began to operate the New Harlan. Subsequently, Coomer was able to buy both Warner and Universal first runs away from the Margie Grand (R. 861-65). Then, in the 1941-42 season, the Margie Grand bought 2 blocks of 5 Warner pictures (Coomer having bought the first block), but was not able to buy the Universal product (R. 862, 864-65, 850, 869). Apparently the deprivation of 10 Warner pictures was not serious enough for Coomer to make any efforts to get later blocks of Warner pictures on first run for the same season.

**First recital of evidence in Finding 9(a)**

After making the specific references to loss by competitors of particular product in particular towns and years,

in Finding 9(a), the Court recites certain evidence. The first such recital (R. 3216) is:

> "Relative to six towns including Corning, Lynch wrote on October 21, 1933, Metro: 'If there are any other opposition towns where you believe you can sell a second run, I would appreciate it if you would take the matter up with me first before selling.'"

The Court's implication would seem to be that Lynch, the Schine film buyer, was interested in knowing what second runs might be available in other "open" towns, in order to "arbitrarily deprive" competitors of such runs. Not only is such an inference unfair, taking the letter by itself, but it is quite inconsistent with the circumstances in which the letter was written, 11 years before the trial.

Second runs are not sold in all towns that have more than one theatre; and the consent decree in the *Paramount* case, while in general it required each distributor to sell an exhibitor *on some run* any picture for which the exhibitor was willing to meet the distributor's terms, recognized that there might be some situations in which the distributor would have a good reason for not selling a second or subsequent run, and therefore contained an exception to the requirement in cases where "the granting of a run on any terms [to a particular theatre] will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located" (66 F. Supp. at 331).

When Lynch referred to "other opposition towns where you believe you can sell a second run", he was recognizing that in some towns Loew's would not sell a second run.

Lynch was buying the Loew's second run for 2 "closed" towns (Piqua and Oswego) and 4 "open" towns (Corning,

Lockport, Glens Falls and Watertown), in each of which Schine had 2 theatres. Schine had just acquired the 2 theatres in Glens Falls, was just reopening the Hi-Art in Lockport after a joint operation with Paramount in that town had terminated, and the Corning and Oswego Theatres had just reverted to Schine from the Fox-Metropolitan receivership. There were at that time at least 2 other "open" or "opposition" towns where Schine had more than one theatre—Amsterdam and Auburn. In either of those towns Schine would be a customer for Loew's second run if (a) Loew's wanted to sell second run and (b) Schine was operating a second-run house or might consider changing the policy of a house to include second runs.

It is of advantage to an operator, who has both a first-run and a second-run theatre in a town, to play his second-run from among the pictures that he has played first-run, since then he can fix the timing of both runs—within the limits of availability and clearance—so as to attract the greatest public patronage to both showings. It is also of advantage to a distributor, as was brought out at the trial (R. 2867, 2904), to have the same operator play both runs of a particular picture in a particular town. It was entirely normal, therefore, for Lynch to be interested in any Loew's second runs that might be available in other towns.

It is difficult to see what is wrong with a request that a buyer be informed if the seller should decide to sell some additional thing—something other than what the buyer has purchased. It is even more difficult to see how such a request gives support to the proposition of Finding 9(a) that "Independents were arbitrarily deprived of second-run product which they had previously exhibited."

FINDINGS 18 AND 19

We now deal with those portions of Finding 18 (refusal of distributors to sell "runs not bought by Schine"), and Finding 19 (refusal to sell runs that were bought by Schine), which have not been discussed under the previous headings of this Point.

Findings 18 and 19, after eliminating references to towns that have already been discussed, are as follows:

> "18. In certain instances the distributors refused to negotiate with the independents for runs not bought by Schine. Such are seen in the refusal of * * * MGM [to furnish second run] at Amsterdam until the 'Schine' deal did not materialize; by United Artists at Geneva; and by RKO, Universal and Fox at Paris.
>
> "19. In many instances the distributors refused to negotiate with the independent for runs. After 'the Circuit' came into the town, in many instances it was impossible for the independent to get a good run of major product, or even to have his requests to purchase considered. RKO would not sell to the independent after 'the Circuit' came in for * * * 1935-36 in Mt. Vernon; MGM would not sell * * * 1933-34 in Lockport and Norwich, * * * 1936-37 in Lexington, 1938-39 in Medina; Paramount would not sell 1933-34 in Lockport, * * * 1935-36 in Mt. Vernon; Fox would not sell 1933-34 in Norwich, 1935-36 in Amsterdam and Mt. Vernon; Universal would not sell 1933-34 in Lockport and Norwich; United Artists would not sell 1935-36 in Mt. Vernon * * *; and Warner would not sell 1933-34 in Norwich, 1935-36 in Amsterdam, 1938-39 in Medina and 1941 in Norwich. In these instances, when the independent attempted to make application for product, he was simply advised that the product had been sold to 'Schine' in a circuit deal."

**Amsterdam**

The Court found that Fox and Warner would not sell to the "independent" in Amsterdam, in 1935-36, and (without specifying in what year) that MGM would not sell second run in Amsterdam "until the 'Schine' deal did not materialize".

The operator of the Orpheum, in Amsterdam, was Morris Kronick. According to Kronick's testimony, his theatre had 299 seats and no toilet facilities, and was not in continuous operation (R. 1714-15, 1719). It had no major product on first run in 1935-36, but always had sufficient second run of major product, at first from Paramount, Warner, Fox and Columbia, and then from MGM, Paramount, Universal and Columbia (R. 1714-18). Kronick testified he could not get Warner product in 1935-36, because Warner was committed to Schine; but that Warner's representative told him, in effect, that he would be glad to sell Kronick any picture that Schine did not play (R. 1712-13). He also testified that he tried to get Fox product but was unsuccessful. There is an inadmissible Loew's inter-office memorandum dated November 30, 1936, stating that a Schine representative, George Lynch, had asked Loew's not to sell the Orpheum second-run (Ex. 497, R. 3925, 2605), and there is an equally inadmissible Warner inter-office memorandum dated February 26, 1935, stating, *inter alia*, that Lynch did not want Warner to sell the Orpheum second-run, mentioning that "You were not in favor of selling second-run in Amsterdam even prior to the Schine set up", and referring to the hope that "we can work out something here that would satisfy Mr. Schine" (Ex. 554, R. 3925, 2605).

But whatever may be the merits of George Lynch's position on whether second runs should be sold in Amster-

dam, or of the opinion of the Warner official who did not favor selling second runs in Amsterdam even before Schine came into the town, the fact is that Kronick, after "the Schine deal did not materialize"—i.e., after Schine ceased to negotiate for second run of Loew's in the town—did get the Loew's product second run as well as a sufficient supply of other second-run product that he needed for his theatre (R. 1716, 1718).

It can hardly be argued that any distributor in its right senses would play its pictures in Kronick's theatre on first run, if it could play them on that run in a modern, up-to-date theatre in the same town.

**Geneva**

The Court found that United Artists "refused to negotiate with the independent for runs not bought by Schine" in Geneva, New York.

This finding is incorrect. In August, 1939, before the Park Theatre, which was being constructed from the remains of a hotel destroyed by fire, had opened, DeToto, booking agent for the theatre, and De Pillo, its owner, went to see a representative of United Artists and asked for current second-run pictures (R. 909-12, 968-69). They were offered 1938-39 pictures second-run (R. 973). However, they turned down the offer, one of the reasons being that they thought the price asked was too high (R. 973).

The Park Theatre opened on Thanksgiving Day, 1939 (R. 977), and in January and February, 1940, United Artists licensed practically all its current product to the Park (Ex. D-27, R. 5199, 971; Ex. 717, R. 4294-95, 2538). Meanwhile, the Park had been playing the product of other distributors (R. 970, 974).

After 3 or 4 months of operation, the theatre shut down because business was unprofitable (R. 977). There is nothing in the record, however, to show that its failure to make a profit was due to any difficulty in getting product, rather than to the fact that Geneva, with a population of 15,000, had two large theatres in operation, seating a total of some 3,000 people, at the time the Park Theatre opened (R. 226, 913).

**Lexington**

The Court found that Loew's would not sell to the "independent" in Lexington in 1936-37.

That finding is plainly erroneous, as well as insignificant. The fact is that the "independent" was offered, and did buy, Loew's product in Lexington in 1936-37 (R. 2028-30).

In 1936 Schine entered the Lexington field, buying 4 theatres, two of them first-run, one second-run and one third-run—all from the same owner. There were two other theatres in Lexington, the Opera House, primarily a third-run theatre, and the Ada Meade, a fourth-run house (R. 2026-29). The Opera House was operated by Harry Schwartz, who testified as a witness for the Government. Neither the owner of the Ada Meade nor anyone else introduced any evidence as to that theatre. The finding that Loew's would not sell to "the" independent refers to Schwartz.

Schwartz testified that in 1935-36, one year before Schine came to Lexington, he played MGM's prior season's product second-run and its current product third-run (R. 2027-28). The testimony which apparently led the Court to find that MGM "would not sell" for 1936-37 is that Schwartz "talked to Mr. Booth, the MGM Manager," and

that he said "that the first three runs [in Lexington] had been sold to the Schine interests* and that I could have fourth run" (R. 2028).

Schwartz went on to state that, after protesting to Loew's, he did in the end accept the offer of fourth run, and did play MGM product fourth-run in 1936-37 (R. 2028-30). There is absolutely no other evidence of any character regarding dealings between MGM and a Lexington "independent" for 1936-37. There is no correspondence on the subject between Schine and MGM or between Schine and anyone else. There is not even a suggestion that Schine ever discussed the subject with anyone, far less that he restrained anyone or conspired with anyone.

In summary, the evidence showed only that Schine bought the first three runs of MGM product for 1936-37 for its first, second and third-run theatres, and that the fourth run of MGM product for that season was sold to Schwartz. The Court was under a serious misapprehension of the testimony when it found that Loew's "would not sell to the independent" in 1936-37.

**Lockport**

In Finding 19, the Court found that MGM, Paramount and Universal would not sell to the "independent" in Lockport in 1933-1934. In Finding 11(e), the Court made additional findings as follows:

> "At Lockport, during negotiations with 'Schine' for the 'Palace' theatre, May said it would be necessary to re-open the Hi-Art owned by 'Schine' to use up 'the large volume of product they had bought'. This statement evidently was made to induce Reli-

*Schwartz testified that this conversation occurred late in 1936 or early in 1937—in other words, long after the 1936-37 product would normally be sold for that season (R. 2028).

ance to sell the 'Palace.' In this instance it is to be noted that the independents experienced great difficulty in getting product. Hi-Art had then been closed for seven years. Metro, Fox, Universal and Loew's refused major product to the independent. Indicative of the attitude of the distributors is the letter from the Eastern Salesmanager of Loew's who wrote:

> "'In our negotiations with the Schine interests it will very likely be that we will have to give them consideration for our product at Lockport, as well as other situations, and as we are hardly in a position to forego or jeopardize the business from their other situations, and for the further reason that they have for a number of years been a very representative account, we feel that our interests would be best served by giving them such consideration.'"

In Finding 21, it was stated that in Lockport there were "special license provisions * * * tying up second runs", and that in Lockport Schine "bought some product second run and during the currency of the Schine contracts this run did not remain open for sale to others."

In addition, Finding 12 cites Lockport as a case where Schine, "having opened a theatre within a town", "was arbitrarily able to keep the independent from opening a theatre in the town with suitable [sic] run product."* Finally, in Finding 13, Lockport is cited as a case where Schine "was able to monopolize first-run product * * * even though the physical facilities of the independents * * * were better than Schine's".

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*Since Schine had been operating in Lockport since 1922, and the Finding relates to 1933, the expression "having opened a theatre within a town", is hardly descriptive of the facts.

All the above findings rest upon a situation which occurred in Lockport at the end of 1932 and the beginning of 1933, when the owner of the Palace Theatre, which had been operated by Schine, terminated the lease.

Schine had been operating in Lockport since 1922 (R. 2639). Prior to 1927 Schine had 2 theatres in Lockport, the Rialto and the Temple, while Paramount had the other 2 theatres, the Palace and the Hi-Art (R. 2658). The Palace and the Rialto were the large and desirable theatres (R. 228, 2659-61).

Paramount played vaudeville and pictures in the Palace and Schine played "A" pictures in the Rialto and "B" pictures and second-runs in the Temple (R. 2658). The town would not support that number of theatres, and both Schine and Paramount were losing money (R. 2658-59).

In 1927 they merged their operations, each taking a 50% interest in the 4 theatres; and thereafter the Hi-Art was closed and the Temple was torn down (R. 2657).

While Schine and Paramount held, and Schine operated, the Rialto and Palace, the previous policies of the theatres, as above described, were continued for a time, but they were then changed so that the "A" pictures were played in the Palace and the "B" pictures in the Rialto (R. 2659-60).

At the end of 1932, as a result of a controversy with Paramount and Schine, the owners of the Palace terminated the lease and Schine, being unable to negotiate a new lease or to buy the theatre, lost the Palace (R. 1524).

It is at this point that the first part of Finding 11(e) comes in—to the effect that Schine had made a "threat" to induce the owner of the Palace to sell the theatre to Schine. The threat consisted of stating that, if Schine could not buy or lease the Palace, it would have to reopen the Hi-Art,

in order to use up the large volume of product that it had bought for that season.

In other words, Schine tried to persuade the owner of the Palace to lease or sell by pointing out that it had an alternative course by which it could continue its long established 2-theatre operation in Lockport.

The "threat" was not effective, however. Reliance did not sell out, and Schine opened the Hi-Art, playing the first-run product which it had bought for the 1932-33 season—in the Rialto on an "A" policy and the Hi-Art on a "B" and second-run policy. The result of this was that when the owners of the Palace, in association with the head of the Dipson Circuit, started to operate the Palace themselves at the beginning of 1933, the only product that they could buy on first run for the current season was that of Loew's—and that only because Loew's, which Schine had previously bought, had been unable to come to terms with Schine for the pictures of that season (R. 1525, 2877-78).

It seems to have been the Government's theory below that, in the circumstances recited, Schine should have refrained from opening the Hi-Art, should have retained the Rialto in a "B" status, and should have gracefully bowed out in favor of the new operators of the Palace, relinquishing to them the first-run "A" pictures.

The sole basis for expecting such self-abnegation from Schine was that the Palace had previously played the "A" pictures, and therefore must have been a better theatre. Hence the finding that Schine was able to "monopolize" the product even though the competitor had a theatre with better physical facilities.

Schine continued its 2-theatre operation in Lockport, and in the following season (1933-34) composed its differences with Loew's and bought that product on first run,

as well as the product of the other 7 large distributors. In other words, Schine resumed the practice which it had followed prior to the 1932-33 season, when it could not come to an agreement with Loew's, of buying and playing the first runs of the 8 principal distributors.

For the 1933-34 season, Reliance attempted to buy the product of Paramount and Universal, as well as Loew's. There is no indication that it tried to buy the pictures of any other distributors. Paramount declined to sell the first run to the Palace, stating that it was a partner with Schine in the Rialto (R. 1529). Universal stated that it was committed by a franchise agreement to give that run to the Rialto, but that it would be glad to negotiate with Reliance "as we have in the past" for any pictures that the Rialto did not play (R. 1528).

Loew's simply stated that it preferred to sell the pictures to Schine (R. 1529).

The letters from the 3 companies, declining to sell their first runs to the operators of the Palace, were put in evidence by the Government. They were perfectly frank statements of the reasons why the 3 companies, in their own interests, preferred to sell their product to Schine, as they had for many years past.

The situation in Lockport was another example of the operation of the competitive forces, and nothing more than that.

With respect to the finding that second runs were "tied up" in Lockport (R. 3223) and that "during the currency of the Schine contracts this run did not remain open for sale to others", the statement is a truism, since any run of pictures, when sold to one theatre in a town, is not available to any other theatre in the town so long as the contract with the first theatre is in force.

What happened in Lockport was that, because of the competitive position of Schine *in the town*, and its long established relations with the distributors *in respect of that town*, it was able to maintain the position of its theatres as the preferred outlet for first-run pictures, equally well when it had the Rialto and the Hi-Art as when it had the Palace and the Rialto.

**Medina**

Finding 19 states that MGM and Warner would not sell to the "independent" in Medina in 1938-39. Finding 13 cites Medina as one of the cases where Schine was able to "monopolize first-run product", even though the physical facilities of the "independent" were better, and in Finding 10 the Court stated:

> "In Medina, 'Schine' announced the making of an agreement to erect a new theatre immediately after independents started construction."

At the outset we point out that the finding with respect to Warner product in 1938-39 is flatly erroneous, since Warner sold one-half of its product for that season and the preceding season to the Medina Theatre, operated by Schine's competitor (R. 1458; Ex. 509, R. 3927, 2882).

The story with respect to Medina is as follows:

On March 18, 1937, Schine concluded an agreement with Yudelevitz, the operator of the only theatre in the town, the Princess, to acquire a 50% interest in the theatre, under an agreement whereby the parties were to proceed to construct a new theatre in the town (Ex. D-46, R. 5162, 1496).

Thereafter, J. Myer Schine received a letter dated March 25, 1937, from the Masonic Lodge in Medina, stat-

ing that the Lodge had made arrangements for the remodeling of its building to house a new theatre, to be operated by Messrs. Essick and Fine; that the remodeling had commenced on March 15; and that the Lodge wanted Schine to refrain from building its theatre on the ground that the town (population 4,000) was too small for 2 new, large theatres. As a result of that letter (Ex. 1006, R. 4425, 2981), the contract between Yudelevitz and Schine was renegotiated to call for the remodeling of the Princess Theatre, instead of the building of a new theatre (R. 1510-13).

With respect to the Court's finding that Schine announced its agreement with Yudelevitz "immediately after independents started construction", we do not find evidence of that fact in the record, and Essick testified that he first learned of the plan for the new theatre in June, 1937 (R. 1494).

In any event, the Masonic Lodge and Messrs. Essick and Fine, who operated 2 chains of theatres in Ohio (R. 1479), completed their plans, and the new theatre, the Medina, was opened on January 21, 1938 (R. 1475).

With respect to the alleged deprivation of Warner product, we have already pointed out that the new theatre, the Medina, actually got half of the Warner product for 1938-39, so that there was no refusal to sell. In the case of Loew's product, Essick testified that in the summer of 1938 he and his partner applied for Loew's product but did not get it (R. 1459). The Princess had been playing Loew's product in the previous season (R. 1488) and had spoken for it for the next season (Ex. 500, R. 3927, 2607); and Loew's sold the Princess that product.

Essick testified that before the new theatre in the Masonic Lodge was built he and Fine tried to acquire the

Princess, in order that in the operation of their new theatre they would not be "hampered", explaining that he meant

> "Obstructed in any way, because a theatre of that size can be varied [sic], because they can get admission prices and they can do a lot of things that can harm the other theatre, and the best operation would be for the theatres to be together so that you can control the situation" (R. 1484).

Assick testified that he and Fine broke even in the operation of the Medina Theatre for the first two or three months of operation, but lost money from then on (R. 1458-59). A mutual friend of the operators of the two theatres, Mr. Connors of Loew's, suggested that the best solution would be for them to merge their interests (R. 1471, 1507) and brought the two parties together. In April, 1939, a new corporation was organized, in which each interest was to have a 50-50 share, Schine to operate both theatres (Ex. 648, R. 4143, 1466). Schine's interest in the two theatres was 25%.

The net result of Schine's entry into Medina, which was a closed town when Schine bought a half interest in the Princess, was that Schine came out with a 25% interest in a company that held the Princess and the Medina.

**Mt. Vernon**

The Court found that Fox, Paramount, RKO and United Artists would not sell to the independent in Mt. Vernon in 1935-36.

In Finding 19 it is stated that the Court found that Fox, Paramount, RKO and United Artists would not sell to the "independent" in Mt. Vernon in 1935-36. In Finding 10 it is stated, "In Mt. Vernon, May contacted the independent to buy, saying 'Schine' would build unless the deal

could be put through." In Finding 12 Mt. Vernon is mentioned as one of the towns where Schine, having opened a theatre, was "arbitrarily" able to keep the independent from opening a theatre with "suitable" run product. The evidence shows:

At the end of 1933 and the beginning of 1934, Schine acquired all 3 of the theatres in Mt. Vernon, the Vine, the Memorial and the Lyric. In 1934 Schine remodeled the Vine (R. 2670-73). Schine ran the Memorial for a while, but it was not successful and was closed (R. 2731). Schine also ran the Lyric, but it too was not successful. Schine then acquired additional land adjoining the Lyric, tore down the Lyric and erected on the site the Vernon, a modern, fire-proof theatre, with 1,300 seats (R. 2673-75, 235), which was opened on April 29, 1938 (R. 537-38).

Meanwhile, the Memorial, which was part of the County Building, and which was put up at auction periodically for short-term lease, passed out of Schine's possession by expiration of the lease, and was bid in by Emerson W. Long, an operator from the nearby town of Cadiz, who opened the Memorial on New Year's Eve, 1935, and ran it for 6 years, when it was again offered for lease by the County and Schine was the highest bidder (R. 645-48). Long is the individual who was involved in the alleged threat.

With respect to the alleged threat, Long testified that in the summer of 1937, just before Schine built the new Vernon, a Schine employee named Custer asked Long if he wanted to sell out to Schine in Mt. Vernon and take a position in the Schine organization. According to Long, Custer stated that "if we had the chance to deal with [Schine], they would treat us right" (R. 544). Long fur-

ther testified that, two weeks later, appellant May went to see Long and told him that Schine wanted to get a larger theatre in Mt. Vernon and that, unless it could lease the Memorial from Long, it was planning to build a new theatre of its own; and May showed Long sketches of the theatre that Schine was considering building (R. 544).

Long was not receptive to Schine's offer, and the matter was dropped. Long testified, "I told him we weren't interested" (R. 544). Schine then went ahead, as "threatened", tore down the Lyric, and built the new Vernon. Long stayed in business in Mt. Vernon for 3 more years after the alleged conversations with Custer and May. He finally gave up the Memorial lease in December, 1940, not because of any threats, but because, in his own words, "we were unable to secure product that was attractive enough that we could afford to keep open" (R. 569-70).

With respect to the deprivation of product, Long testified that during 1934 he saw representatives of the 4 distributors named in the Court's findings and they all told him that their first-run product had been sold to Schine (R. 516-26). It was the fact that Schine had 2 theatres and had bought the product (R. 235-36, 516-26).

It would seem that Long, who was an experienced theatre operator (R. 570-71), who explained on the stand how he had bought out the opposition in his own town in 1927, and who used his "closed" town for the purpose of inducing the distributors to sell him in an open town (Ex. D-2, R. 5144, 592), certainly took a business risk when he opened the Memorial Theatre, which Schine had previously dropped as unprofitable.

In the course of his testimony, Long admitted that he had an offer of Warner second-run pictures and had told

the salesman that he was not interested in second run, and admitted also that he was getting plenty of first-run product (R. 602-03). As stated, he operated the Memorial for 6 years.

**Norwich**

The Court found that Fox, MGM, Universal and Warner in 1933-34, and Warner in 1941, would not sell to the "independent" in Norwich.

Schine's theatre in Norwich was the Colonia, a large, modern, first-run house which was the outstanding theatre within a radius of 40 miles (R. 2635-36). The opposition theatre was the Strand, a smaller house, owned by W. C. Smalley, operator of a chain of 14 theatres (R. 2463-64, 2409 ~~2543~~).

The Strand had been a Schine theatre, but Schine gave it up in 1929 (R. 2465). Smalley acquired the theatre in November, 1930. In March, 1932, it burned down. Smalley reconstructed it and reopened it eight months later (R. 2409-10).

The Colonia reverted to Schine from Fox-Metropolitan in 1933 (R. 2410).

Smalley testified that in 1930-31 the Strand had RKO, First National, United Artists and Columbia product on first run; that in 1931-32 it had Warner and Columbia product on first run; and that in 1932-33 it had on first run Columbia and United Artists product and half of Warner (R. 2409-11).

In the 1933-34 season Smalley attempted to get product of Loew's, Fox and Universal, none of which he had had in the 3 previous years when Schine was not operating the Colonia, and also Warner, which he had had in one of the

3 years, and a split of which it had had in another of those years. Regarding Loew's product, the only evidence was Smalley's testimony that in the seasons 1933-1934 through 1940-41 no offer was made to him by Loew's for a season deal (R. 2436-37).

Smalley's testimony concerning Fox was that he talked with Mr. Grassgreen of Fox in an effort to get Fox product first-run in Norwich beginning with the 1933-1934 season and that Grassgreen "told me that Schines had all the products bought, and they were a satisfactory customer and that there was no pictures for sale for me." (R. 2438).

There was also introduced into evidence a letter dated November 4, 1937, from Universal to Smalley, stating *inter alia*, that Universal was:

> "tied up with Schine's theatres on a franchise arrangement, whereby we are obligated, by the terms thereof, to make available our feature product to all Schine theatres." (Ex. 897, R. 4389, 2433).

There was also introduced in evidence a letter from Warner to Smalley, dated May 22, 1934 (Ex. 887, 4382, 2423), which said:

> "Please be advised that we have a satisfactory customer in Norwich and are not in a position at this time to deal with you for our next season's product".

Smalley's complaint was that he could not compete with Schine for first run. He admitted that he had no difficulty in obtaining on second run any of the major product that he wanted (R. 2496). Smalley had 12 closed towns and only two open towns in his chain of theatres, and he admitted that quite a few times he told the distributors that he would not buy their pictures in his closed towns unless

they sold him the pictures first-run in Norwich (R. 2457-58).

Thus it will be seen that Smalley's idea of how to deal with the powerful producer-distributors was no different from that which the Government has attributed to Schine.

The evidence on Norwich presents once again the situation where Schine and a competing chain vied for major product. For various reasons—including the fact that Schine had the larger theatre in Norwich (R. 229, 2443)—the distributors preferred to play their pictures on first run in Schine's theatre, rather than in Smalley's theatre. The Government expressly conceded that Norwich was one of the towns in which "other existing theatres offer substantial competition" to Schine (R. 3236).

**Paris**

The Court found that Fox, RKO and Universal "refused to negotiate with the independent for runs not bought by Schine" in Paris, Kentucky.

The "independent" in question was Harry Schwartz, who was contemplating the building of a theatre in Paris. The Government placed in evidence letters to Schwartz from Fox, RKO and Universal, and Schwartz himself testified as to follow-up conversations that he had with the three companies, as follows:

(1) *Fox*. The Government put in evidence a letter from Fox to Schwartz, dated November 7, 1938, stating (Ex. 824, R. 4360, 2040):

> "Thank you for your letter of November 4. We regret that our product will not be available for you in Paris, inasmuch as we have a contract with Schine

and, of course, inasmuch as they are our old account in the town, we shall continue to offer our product to them in accordance with the policy of our company."

Schwartz testified that after he got the Fox letter he went to see Mr. Grady of Fox in Cincinnati, and that he told Grady he realized Schine had already bought the first run but asked Grady for second-run product. According to Schwartz,

> "He said that he was sorry but he could not say at that time whether I could have second-run for the town (Paris) or not. He had heard Schines were going to build a theatre in Paris and they were their first-run account, and they would have to protect them as far as the second-run is concerned, if they were going to build." (R. 2041-42).

(2) *RKO*. The Government placed in evidence a letter from RKO to Schwartz, dated November 7, 1938, stating (Ex. 825, R. 4360, 2040):

> "Replying to your letter of November 4, all of our services are under contract to play first-run at Paris, Kentucky, but by the time you begin operation in that situation, which according to your letter will be March 1, 1938, we may have some services available for you."

Schwartz testified that he went to see Mr. Jacques of RKO and asked him for second-run product and that,

> "He also told me that Schines had anticipated building another theatre in Paris; as long as they were their [RKO's] first-run account he would have to wait and see whether they [the Schine interests] wanted the second-run or not." (R. 2042).

(3) *Universal.* The Government placed in evidence a letter from Universal to Schwartz, dated November 10, 1938, stating (Ex. 826, R. 4361, 2040):

> "Note from your letter of November 4 that you anticipate building a new theatre in Paris and expect to be in operation by March 1. For your information, our product has already been sold in Paris, but, however, there is a possibility of serving you with various pictures that have not been played in Paris during the past year. It is my suggestion that you let the matter rest until you are ready to open this new house."

Schwartz testified that he went to see Krieger of Universal after receiving the latter's letter and that Krieger told him Schine was their first-run account in Paris and that,

> "He had heard they [Schine] were going to build another theatre, and would not be able to give me any information about the second-run until later." (R. 2042).

The letters which the three companies wrote and the follow-up conversations which Schwartz had with each of the three are all of the same tenor. The companies knew that Schine was going to open another theatre in Paris, Schine was already their first-run customer in the town, and, if Schine wanted to bid on second-run product, the companies preferred to sell to it.

J. Myer Schine testified that he received bids for the construction of the theatre in Paris in "the spring or summer of 1938" and that the theatre was completed in 1939 (R. 2686-87). On November 8, 1938, Schine had written to Fox as follows:

> "We are arranging to build a second theatre in Paris, Kentucky, which will be completed around the first of February and we would like to have you hold your product for second-run for our use. Trusting you will give us whatever consideration you can * * *" (Ex. 216, R. 3813, 2603).

To summarize: The Court found that the 3 distributors in question "refused to negotiate * * * for runs not bought by Schine". This sounds as if Schwartz already had a theatre, that he was asking for runs that Schine did not want to buy, and that he was refused. Actually he did not have a theatre; he was asking for runs for the following season, for which Schine had also asked, and the 3 companies thought it better business, in the event that Schine's contemplated theatre was built, to use that theatre as their second run outlet. They had a good first-run customer in Schine, and they proposed to give Schine their second runs if it wanted them.

**FINDING 21**

Finding 21 reads as follows:

> "Special license provisions were given by tying up second runs, as in Lockport and Corning. In Lockport and Corning Schine bought some product second run and during the currency of the Schine contracts this run did not remain open for sale to others."

Of all the Court's findings none, it is submitted, is more lacking in meaning and relevance than this. The practice of selling both first and second runs in a town to the same

exhibitor is both usual and sensible. The obvious explanation for the practice was supplied at the trial by Herman Wobber, Fox Division Manager, who testified that it is most desirable to have the first and second-run in the same ownership, that when one of two competing theatres plays the first run of a picture and the other second run, "we found frequently that the first run seldom advertised to the maximum" (R. 2902-04).

When Schine bought a second run in Lockport, or in Corning, or anywhere else, then obviously, in the Court's language, that run "during the currency of the Schine contracts did not remain open for sale to others." The Court could hardly mean to imply that there was anything improper or illegal or surprising in such a situation. By the very definition of "run" that would be the result.

The situation in Lockport is discussed above.

In Corning, Schine operated 2 theatres and later 3. Irving Cohen operated the fourth and much the poorest, the Plaza. Cohen played some second run, some third run and a good many Westerns (R. 2197-98, 2651).

Cohen testified that he had difficulty getting product for the Plaza and that he went to see J. Myer Schine to find out "if we couldn't work something out", but that Schine said that "they didn't have enough product themselves." (R. 2202-03).

At least 6 of the 8 larger distributors—Fox, Loew's, Paramount, RKO, Universal and Warner—sold both first and second run of their product in Corning to the Schine theatres, but in each case they offered the Plaza the third run and such of the second-run pictures as Schine did not play (R. 2204-09).

If the Court's finding simply means that Schine bought and used all the first run and second run that Schine could locate for theatres in Corning and that the opposition could not buy anything better than third-run and some second-run product then the evidence supports such a finding. But if that is all the finding means—and apparently it is—then it is difficult to understand why the Court bothered to make such a finding or what significance the Court believed should be attributed to it.

**Conclusion**

All the instances cited in Findings 9(a), 12, 13, 18, 19, 20 and 21 involve situations where particular distributors—for reasons which are apparent, and which—whether the reasons were good or bad—are related to their own business interests, chose to sell their pictures on the first run to Schine, rather than to the competing operator or (as in Paris) potential operator.

**2. "Securing Unreasonable Clearances"**

The relevant findings are Findings 9(b), 17, 25, 26.

The findings on clearance afford perhaps the best illustration of the Trial Court's lack of understanding of the business involved in the case and his readiness to accept hearsay testimony and the assertions of Government counsel as the equivalent of evidence with probative value.

Clearance is "The period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres." *United States* v. *Paramount Pictures, supra* (66 F. Supp. at 333).

In the *Paramount* case the Government, taking a position different from the one which it took in the present case, argued "* * * that clearance practices inherently operate to produce unreasonable restrictions of competition among theatres and are therefore per se violative of the Sherman Act * * *" (66 F. Supp. at 341), but the Statutory Court held to the contrary, saying:

> "* * * With this we do not agree, for it seems to us that a grant of clearance, when not accompanied by a fixing of minimum prices or not unduly extended as to area or duration, affords a fair protection to the interests of the licensee without unreasonably interfering with the interests of the public. * * *"

The position which the Government took in this case was that clearance was a customary and proper method of doing business. Government counsel said (R. 493-94):

> "* * * I lay stress on this method of licensing [*i.e.*, by runs and clearance] because the method of licensing that is characteristic of the business and customary in it is one which in itself is obviously of such a nature that there is a constant restraint of trade because every time a distributor makes a film contract with any exhibitor trade is restrained in the sense that the contract he makes with one exhibitor to some extent determines the terms on which that same film can be made available to other competing exhibitors. That is it will fix a run and give a clearance protection and provide admission prices which will to a great extent directly determine the terms on which the film can be played by the competitor. And, as I say, each contract that is made, of course, does restrain competition in that sense.

> "Now, we do not here attack those restraints as such. Whatever may have been the position originally this method of licensing films through clearance and minimum admission prices has been established in the industry and it is the way in which the industry operates and so long as those restraints are reasonable, as far as we are concerned, there clearly is no conflict with the Sherman Act. * * *"

The system of distributing pictures in a sequence of runs with intervening clearance was established by all producer-distributors of motion pictures some twenty-five years ago as the method of distribution best calculated to bring them the maximum revenues from the rental of their films (R. 2794-95). Exhibitors, dependent for product on the producer-distributors, have been compelled to do business and to bargain within the framework thus created. In determining which exhibitor shall have the prior runs, the producer-distributors choose those who can provide the most satisfactory combination of theatre property, willingness and ability to pay substantial film rentals, and experience and skill in the business of operating theatres (R. 2809, 2862, 2931). Thus to obtain prior runs, exhibitors have had to offer the producer-distributors high rental fees, to make large investments in theatre property, and to maintain good standards of showmanship and financial integrity.

As the inducement to the exhibitor to pay the price for prior runs, producer-distributors have nothing to offer but clearance over other theatres; and the amount of clearance that can be obtained is a matter of bargaining between them and the exhibitor. In this bargaining the interests of the producer-distributor and the exhibitor are opposing. As the Court found in the *Paramount* case (66 F. Supp. at 343):

"* * * There is a difference between a distributor's and an exhibitor's interest in the period of clearance granted. The distributor wants to get the most possible in film rental from all the runs, the exhibitor to get as much clearance over a succeeding run as possible, because he has no interest in any succeeding run. The distributor, however, has a definite interest. * * *"

It might appear from a reading of the opinion and the findings of the Court below that clearance is a simple matter. Actually it is a very complicated matter. As the Temporary National Economic Committee has found (Monograph No. 43, "The Motion Picture Industry—A Pattern of Control", p. 40):

"The establishment of clearance schedules is an intricate procedure. It involves a complex bargaining process and the balance of a variety of opposing economic interests. It may be stated initially that the primary objective of the distributor is, of course, to maximize his total revenue from each picture. This aim gives him a very direct interest in clearance periods. The higher rental fees paid by the prior-run exhibitor are directly conditioned on the extent of the protection which he is granted, and in general the longer the clearance period before subsequent showing, the higher the rental fee the prior-run exhibitor will pay.

"On the other hand, the distributor's revenue from subsequent-run exhibition is also important to him; this income may mean the difference between black or red ink on his ledgers. But the longer the clearance period, the smaller will be these returns—not only because more customers will have attended the prior showing rather than wait for subsequent exhibition, but also because the effects of the advertising and exploitation efforts made when

> the picture was released will have been vitiated over this time. In general, the greater the total box-office return earned by a film in all showings, the greater will be the distributor's revenue."

An understanding of this conflict of interest is of paramount importance as concerns the findings of unreasonable clearance in the present case, inasmuch as both the Court and the Government have here taken the unsupportable position that clearance is reasonable only if it satisfies completely the interest of the distributor.

The question of what constitutes reasonable clearance has always been the most controversial question in the motion picture industry. Its complexity was certainly not appreciated by the Court in the present case, inasmuch as the Court found many specific clearances "unreasonable" without, as will be demonstrated, any evidence concerning the factors which, in the understanding of the industry and by judicial decision, must enter into any determination of the reasonableness of a specific clearance.

In the consent decree in the *Paramount* case, provision was made for the arbitration of clearance controversies, according to standards which the decree set forth. The pertinent provision of the decree as outlined in the Court's opinion (66 F. Supp. at 331) are abstracted in the margin.*

*Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration under the following provisions:

It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures.

In determining whether any clearance complained of is unreasonable, the arbitrator shall take into consideration the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

While the Paramount consent decree sets forth 7 types of arbitrable controversies between producer-distributors and exhibitors, the complaints filed under Section VIII, the clearance section, far outnumbered all other complaints. Of the total 473 complaints filed under the decree through the year 1946, 349—or about 74%— were filed under Section VIII exclusively. 397 complaints, or about 84% of the total complaints, involved a complaint under Section VIII.*

In the decision in the *Paramount* case, the Court found that numerous and complex factors must be taken into account in determining the reasonableness of a particular clearance. The Court stated (at 343):

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(1) The historical development of clearance in the particular area wherein the theatres involved are located;

(2) The admission prices of the theatres involved;

(3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut rate tickets, lotteries, etc.;

(5) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor defendant from such theatres;

(6) The extent to which the theatres involved compete with each other for patronage; and

(7) All other business considerations, except that the arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres.

*The figures for the years 1941 and 1942 are to be found in the Quarterly Reports of the Motion Picture Arbitration Tribunals, issued by the American Arbitration Association, the administrator of the Consent Decree. No official figures have been published for the subsequent years but the data here used for these years was obtained from the records of the American Arbitration Association.

"In determining whether any clearance complained of is unreasonable, the following factors should be taken into consideration and accorded the importance and weight to which each is entitled, regardless of the order in which they are listed:

"(1) The admission prices, as set by the exhibitors, of the theatres involved;

"(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

"(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

"(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

"(5) The extent to which the theatres involved compete with each other for patronage;

"(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

"(7) There should be no clearance between theatres not in substantial competition."

It is this background, then, against which must be measured the finding and conclusion of the Court in the instant case that appellants violated the Sherman Act by obtaining unreasonable clearance for their theatres over independent theatres.

**FINDING 9(b)**

In Finding 9(b) the Court found that "'Schine' was able to secure unreasonable clearances year after year in many towns," and specifies the following clearances which are all clearances of first run theatres over second-run theatres in the towns named (R. 3216):

| Town | Distributor | Clearance |
|---|---|---|
| Corning, N. Y. | RKO | 90 to 180 days |
| | Fox | 160 days |
| Seneca Falls, N. Y. | Columbia | 120 days |
| | United Artists | 120 days |
| Little Falls, N. Y. | RKO | 120 days |
| | Columbia | 120 days |
| | Universal | 120 days |
| | United Artists | 115 days |
| Carthage, N. Y. | RKO | 120 days |
| | United Artists | 90 days |
| Watertown, N. Y. | United Artists | 90 days |
| Amsterdam, N. Y. | United Artists | 90 days |
| Bucyrus, Ohio | United Artists | 90 days |
| Kent, Ohio | United Artists | 90 days |
| Norwalk, Ohio | United Artists | 90 days |
| Tiffin, Ohio | United Artists | 90 days |
| Fostoria, Ohio | United Artists | 90 days |
| Lexington, Ky. | United Artists | 90 days |
| Van Wert, Ohio | United Artists | 90 days |

In addition, it is found that "Schine got clearance for Herkimer over Ilion where none existed before."

These findings are in many instances incorrect as concerns the number of days clearance which Schine secured for its theatres in these towns.

Before discussing the incorrectness of the Findings, it is worth pointing out that for all the towns listed above except Carthage, Kent and Tiffin, the Government had witnesses on the stand who testified concerning such towns and were in a position to give testimony on the subject of clearances in those towns. Yet in not a single instance was such a witness examined on the matter of clearance; and no testimony on clearance was given with respect to any of the towns. The Government made no effort to present the issue, except on the broad basis that all Schine contracts for clearance were unreasonable on their face.

The most clearance which Schine ever secured from RKO in Corning, N. Y. was 160 days (Ex. R-7, 5803, 1183)*, not 180 days as found. Schine did not secure 160 days clearance on Fox product in Corning, but only 60 days (and that over its own theatre) and 30 days over the Plaza theatre (Exs. F-101 (5)(6), R. 5979-5982, 2545, Exs. F-141, F-142, R. 6073-6074, 1181, Exs. F-8, F-9, 5914-5915, 2577).

In Little Falls, the most clearance Schine received on Universal product was 90 days (Ex. 1009, R. 4428, 2987), not 120 days as found.

In Amsterdam, Schine did not receive 90 days clearance on United Artists' product as found. The only evidence of United Artists' clearance in Amsterdam is a 30-day clearance over the towns of Broadalbin, Fonda, and Johnstown, N. Y. (Ex. 958, R. 4393, 2537).

As for the finding that "Schine got clearance for Herkimer over Ilion where none existed before," nothing

*See original Exhibit. The digest thereof in the printed record is incorrect in this respect.

could be further from the fact. In the period 1929-1933, when Fox-Metropolitan Playhouses, Inc. operated the theatres in Herkimer, Herkimer had 14 days clearance over Ilion. Shortly after Schine took over the operation of the Herkimer theatres in 1933, the clearance of Herkimer over Ilion was reduced to 10 days (R. 2382-83). The evidence further shows that Herkimer and Ilion are only 3 miles apart; that there are good roads connecting them and a population residing between them; that Herkimer is the county seat and the shopping center for residents of Ilion, and that there is competition between the theatres in the two towns, inasmuch as clearance between them has substantial commercial advantage (R. 2381, 2383).

More significant than the errors in these basic findings is the fact that the Court apparently failed to realize that most of the clearances which it found unreasonable were clearances that operated only against Schine's own theatres.

The only evidence that Columbia granted Schine 120 days clearance in Seneca Falls, is a contract dated November 19, 1940 (Ex. C-181 (28), R. 5088, 1190). The only evidence that United Artists granted Schine 120 days clearance in that town is a clearance schedule effective November 16, 1938 (Ex. 958, R. 4393, 2537) and a clearance schedule for the 1940-1941 season (Ex. 959, R. 4397, 2537). Since April 1936, all the theatres in Seneca Falls have been operated by Schine (R. 231).

The only evidence that Universal granted Schine 90 days clearance (not 120 as found) in Little Falls, is a clearance schedule for the 1936-37 season (Ex. 1009, R. 4428, 2987). Since June, 1936, Schine has operated all the theatres in Little Falls (R. 227-28).

The only evidence that United Artists granted Schine 90 days clearance in Bucyrus, is a clearance schedule to be effective November 16, 1938, and a schedule for the 1940-41 season (Ex. 958, R. 4393, 2537, Ex. 903, R. 4392, 2537). Since April, 1937, Schine has operated all the theatres in Bucyrus (R. 234).

The only evidence that United Artists granted Schine 90 days clearance in Kent is a clearance schedule for the 1940-1941 season (Ex. 903, R. 4392, 2537), and one effective November 16, 1938 (Ex. 958, R. 4393, 2537). Since December, 1937, Schine has operated all the theatres in Kent (R. 235).

The only evidence that United Artists granted Schine 90 days clearance in Norwalk, is a clearance schedule effective November 16, 1938 (Ex. 958, R. 4393, 2537), and one for the 1940-1941 season (Ex. 903, R. 4392, 2537). Schine has operated all the theatres in Norwalk since December, 1936 (R. 236).

The only evidence that United Artists granted Schine 90 days clearance in Tiffin, is a clearance schedule for the 1940-41 season (Ex. 903, R. 4392, 2537), and a schedule effective November 16, 1938 (Ex. 958, R. 4393, 2537). Since February 1938 Schine has operated all the theatres in Tiffin (R. 237).

The only evidence that United Artists granted Schine 90 days clearance in Fostoria, is a clearance schedule effective November 16, 1938, and a clearance schedule for the 1940-1941 season (Ex. 903, R. 4392, 2537, Ex. 958, R. 4393, 2537). Since July, 1937, Schine has operated all the theatres in Fostoria (R. 235).

While there were competing theatres in Corning, when RKO in the 1934-1935 season licensed its pictures to

Schine's Fox and State theatres in that town on first run, with 160 days clearance over second run (R. 225, Ex. 628-D, R. 5440, 2986, Ex. R-7, R. 5803, 1183), RKO in that season licensed its pictures on second run in Corning to Schine's State Theatre (Ex. 628-E, R. 5441, 2986), so that the clearance, again, was directed against Schine's own theatre. Likewise, while Fox granted the Schine first-run theatre in Corning 60 days clearance over second run, the second-run theatres were also Schine theatres (Exs. F-101 (5)(6), R. 5979-5982, 2545, Exs. F-141, F-142, R. 6073-74, 1181).

In the 1933-34 season, United Artists granted Schine's first-run theatre in Watertown 120 days clearance over second run (Ex. 281, R. 3827, 2537). In the 1938-39 season, and in the 1940-41 season, this clearance was 60 days (Ex. 958, R. 4393, 2537, Ex. 959, R. 4397, 2537). While there were theatres in Watertown in competition with the Schine theatres there, United Artists' pictures were licensed to Schine theatres on second run in Watertown in the 1933-34 season (Ex. 122, R. 5327, 2537), with the result that the clearance granted to the first-run theatre was again clearance over Schine's own theatres.

This leaves for consideration the 120 and 115-day clearances granted by RKO, Columbia and United Artists in Little Falls; the 120-day clearance granted by RKO, and the 90-day clearance granted by United Artists, in Carthage; the 90-day clearance granted by United Artists in Lexington; and the 90-day clearance granted by United Artists in Van Wert.

**Little Falls**

In the 1933-1934 season, United Artists licensed its pictures to Schine's Rialto Theatre in Little Falls with 115

days clearance (Ex. 281, R. 3827, 2537). The other theatre in Little Falls was the Hippodrome (R. 228). There is no evidence that the Hippodrome played United Artists' product in the 1933-34 season, and there is no evidence that it had any interest whatsoever in licensing that product second run on any terms. In the next season, 1934-35, United Artists' pictures were "sold away" from Schine and licensed to the Hippodrome theatre on first run (R. 1722-23). In the same season RKO and Columbia licensed their pictures to Schine's Rialto with 120 days clearance (Ex. R-14; R. 5810, 1183, Ex. 672D, R. 5484, 2531). While the Hippodrome did not play RKO pictures on second run that season (R. 1725, 1728-29), it did play Columbia pictures second run (R. 1722). However, there is no evidence sufficient for a finding that the 115-day or 120-day clearance granted to Schine's 1200-seat Rialto Theatre (R. 227) over the 555-seat Hippodrome (R. 228)—which charged a 20¢ adult orchestra admission price against the Rialto's 30¢ (R. 1723)—was unreasonable. Since June, 1936, Schine has operated all the theatres in Little Falls (R. 227-28).

**Carthage**

In the 1934-35 season, RKO granted a clearance of 120 days (Ex. R-6, R. 5802, 1183), and United Artists a clearance of 90 days (Ex. 281, R. 3827, 2537), to Schine's Strand Theatre in Carthage over the only other theatre in Carthage, the State (R. 224). During the same season Schine acquired the State (R. 254). There is no evidence that the State was interested, in that part of the 1934-35 season in which it was not operated by Schine, in licensing RKO or United Artists' pictures second-run on any terms whatever. Nor is there evidence sufficient for

a finding that the 120-day or 90-day clearance granted to the 786 seat Strand Theatre (R. 224) in a town with a population of about 4000 (R. 2573) was unreasonable.

**Lexington**

In the 1938-1939 season, United Artists licensed some of its pictures first run in Lexington to Schine's Kentucky, Ben Ali and Strand theatres. These theatres were given 60 days clearance over Schine's State and 90 days clearance over the Opera House and Ada Meade (Ex. 958, R. 4393, 2537). There is no evidence that the Opera House or Ada Meade played or had any interest in playing United Artists' pictures second-run on any terms in the season concerned. On the other hand, Schine's theatres in that season did play United Artists' pictures second-run (Ex. 141, R. 5350, 2537, Ex. 142,* R. 2537). There is no evidence that the operators of the Opera House or Ada Meade ever complained of this clearance, and there is certainly no such evidence concerning the factors which determine the reasonableness of clearance as to justify the finding that the clearance was unreasonable.

**Van Wert**

In the 1938-1939 season United Artists granted a first run clearance of 90 days to Schine's Van Wert or Strand (Ex. 958, R. 4393, 2537). There is no evidence that the opposition theatre, the Ohio, was interested in licensing United Artists' pictures in this season second run on any terms whatsoever. Moreover, there is no evidence that the clearance, if actually imposed on the Ohio, would have been

*This exhibit is not a part of the printed record but, by stipulation, may be referred to (R. 3553).

unreasonable. Such evidence as there is is to the contrary. Schine's Strand Theatre seats 710, and Schine's Van Wert Theatre, newly built in 1935, seats 802 (R. 237, 657). The Ohio Theatre on the other hand is a converted store, 40 feet by 120 feet, and seating 347 (R. 675).

There is nothing whatever to support the finding that the clearances enumerated in Finding 9(b) were unreasonable.

### FINDING NO. 17

The next finding concerning unreasonable clearance is Finding No. 17. The Court there first makes a general finding that "In numerous instances unreasonable clearances were allowed to Schine over towns in which Schine did not operate, and some towns distant from 10 to upwards of 20 miles, and towns in which there were no theatres" (R. 3220-21).

Since the very idea of clearance is to prevent competing exhibitors from exhibiting pictures simultaneously, it is common throughout the industry for one town to have clearance over another town. Nor is there anything abnormal about the fact that a Schine theatre took clearance over a town (Norwich over Sidney) distant "to upwards of 20 miles" (Ex. 984 (25), R. 5677, 2547, R. 2445).

There is no rule of law that theatres 24 miles apart cannot be competitive. In fact the Appeal Board of the Motion Picture Arbitration Tribunals under the Consent Decree in the *Paramount* case found it reasonable for theatres 66 miles distant from Schine's Plaza Theatre in Milford, Delaware, to have clearance over said Plaza Theatre (*In the Matter of the Arbitration between Sidney Theatre Corp. and Loew's, Inc., et al.*, Decision No. 61). As for

Schine's clearance over towns in which there were no theatres, the alleged specific instances of this practice will be considered later.

In Finding No. 17, the Court finds unreasonable the following specific clearances (R. 3221):

| Town | Clearance | Distributor |
|---|---|---|
| Gloversville, N. Y. | 45 days over Johnstown, N. Y. | |
| Lockport, N. Y. | Over Newfane, N. Y. | |
| Ilion, N. Y. | Over Mohawk, N. Y. | |
| Salamanca, N. Y. | Over Randolph, N. Y.<br>Over Little Valley, N. Y.<br>Over Elliottville, N. Y. | |
| Ashland, Ohio | Over Loudenville, Ohio<br>Over Lodi, Ohio | Loew's<br>Loew's |
| Auburn, N. Y. | Over Skaneateles, N. Y. | United Artists |
| Hornell | Over Earlville | |

Schine's Hippodrome and Glove theatres in Gloversville have had 45 days clearance over theatres in Johnstown, (*e.g.*, Ex. 618, R. 3952, 2524). The two towns are adjacent, their centers being 3 miles apart (R. 2446), and the operator of the Johnstown theatres conceded that his theatres and Schine's Gloversville theatres compete for patronage (R. 2451-52). There is not a scintilla of evidence to support the finding that this clearance is unreasonable.

Schine's Rialto, Palace and Hi-Art theatres in Lockport have had clearance over Newfane and Schine's Capitol Theatre in Ilion, has had clearance over Mohawk (Ex. P-209, R. 5869, 1170, Ex. P-210, R. 5870, 1170). There is no admissible evidence in the record that there are no theatres in Newfane or Mohawk. What is more, it seems clear that the reasonableness of a clearance is not subject to determination if there is no theatre upon which the clearance is imposed. Furthermore, a finding that clear-

ance against a non-existent theatre is unreasonable cannot stand in the absence of proof that the clearance would have been unreasonable against an existing theatre in the same location. This "finding" by the Court was purely hypothetical.

**Salamanca**

The Court next goes on to find that "Many clearances were over outside towns of comparably small population, distant so far that no clearance is justified, such as Randolph, Little Valley and Elliottville, New York." The fact is that Schine's Andrews Theatre in Salamanca had clearance over Randolph, Little Valley and Ellicottville (not Elliottville as found) (*e.g.*, Ex. 618, R. 3952, 2524). There is no evidence concerning the distance between those towns and Salamanca, no evidence concerning the competition between the theatres, or concerning the admission prices charged by the theatres in the 3 towns over which the clearance was taken, or concerning the character and location of the theatres (including size, type of entertainment, appointments, transit facilities, etc.) or concerning the operating policies of these theatres, no evidence of the rental terms and license fees paid by them to the distributors—in other words, no evidence of any one of the factors which are material to the determination of the reasonableness of clearance.

**Ashland, etc.**

The Court then finds that "Many [clearances] recently were given over towns over which there had been no previous clearance. Metro gave clearance in Ashland over Loudenville and Lodi, Ohio; United Artists gave clearance in Auburn over Skaneateles, New York, and Fox in Hornell over Earlville, New York."

The clearance of Ashland over Loudenville and Lodi is discussed under Point I, where it is pointed out that the Court neglected to mention that Schine, in turn, was subject to clearance in Ashland, Ohio in favor of the larger and more distant city of Mansfield, Ohio. It may be added here that the Court's statement that the clearance of Ashland over Loudenville and Lodi had been given "recently" was wrong, since the Loew's and Fox clearance dates back to 1936 for Loudenville and 1937 for Lodi (Ex. 618, R. 3952, 2524; Ex. F-42, R. 5947, 2577; Ex. 618, R. 3952, 2524), whereas Schine acquired the Ashland theatre only in November, 1935 (R. 233).

No reason is suggested why the historical pattern of clearance must remain inviolate. Indeed, in the *Paramount* case, the producer-distributors' practice of fixing clearance on an historical basis was condemned by the Court (66 F. Supp. at 341-46); and surely if appellants were able to resist the practice it would seem to their credit. Actually the evidence shows that Schine's Palace Theatre in Ashland had clearance over Loudenville on Loew's (Metro) and Fox product as early as 1936 (Ex. 618, R. 3952, 2524, Ex. F-41, R. 5947, 2577). Schine had acquired the Palace Theatre in Ashland in November, 1935 (R. 233).

As for Auburn's clearance over Skaneateles on United Artists' product, there is no first run Auburn clearance in evidence which does not include a clearance over Skaneateles*; and again there is no evidence to support a finding that this clearance is unreasonable. Schine's competitor, Wallace, likewise had clearance over Skaneateles (Ex. D-125, R. 6200, 2139).

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*Ex. 618, R. 3952, 2524, Ex. F-101(1), R. 5971, 2545, Ex. F-4, R. 5910, 2577, Ex. F-138, R. 6070, 1181, Ex. P-198, R. 5858, 1170, Ex. W-3, R. 4429, 1159-62.

As for the alleged clearance of "Hornell over Earlville, New York" on Fox product, Schine has no theatre in Hornell. Schine's Colonia Theatre in Norwich did have clearance over Earlville on Fox product since 1935 at least (Ex. F-101 (20); R. 6009, 2545), and there is no evidence that that clearance was either recent or unreasonable.

The balance of Finding 17 (R. 3221-22), which is quite lengthy, commences with the statement that:

> "The record is replete with inter-department communications between major film representatives which recognize the unreasonableness of the clearances given to Schine at his demand."

The Court then cites various "communications and representations" made by representatives of the distributors, which, it says, "are inadmissible in evidence because these men all held positions in their respective companies so that it was within the scope of their duties to make the representations in the communications that they did as a natural incident of the office, i.e., branch or district manager." (R. 3221).

Then follow some of the most extreme examples of the use of hearsay statements and opinions as proof of the alleged unreasonableness of clearance. Some of those statements and opinions have been quoted and commented on in Point II. The others, equally inadmissible and equally unreliable as evidence, are as follows:

> "Pielow, MGM resident manager, wrote: 'I feel that in some of the situations (unnamed) (discussing Schine contracts), the clearance that he (Lynch) is demanding is unfair * * *.' Dana, branch manager of Universal wrote the district manager that he had

asked Louis Schine relative to clearances over the Smalley circuit (Norwich) and that he refused to grant the privilege of serving the pictures with shorter clearance. Universal branch manager Sauber wrote Lynch that they wanted to serve Waterloo in less time than the 30 days clearance after Seneca Falls because other majors were, but Lynch refused though Universal had the right under its contract to do so. At Rochester, Scully, of Universal, said it would be satisfactory if the Madison and Monroe came within the Schine 21 day clearance. Smith, branch manager of Warner, wrote to the Home office that Canton would do more business if it were not for Schine at Ogdensburg having 30 days clearance and if it was reduced; 'it will make a better condition* for us all * * *' Smith also wrote relative to Seneca Falls stating that he hoped Lynch would break down their 60 days clearance: 'As I told you this morning over the phone, the clearance set up is all wet * * *'

The admission of these producer-distributor inter-office communications over appellants' objection, and their use as evidence to support the finding that clearances obtained by Schine theatres were unreasonable; was a most obvious and gravely prejudicial error, disclosing a thorough misunderstanding of appellants' principal objection and a complete misunderstanding concerning the producer-distributor's interest in clearance.

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*The Court ruled, in its written opinion, that the exhibit containing the statement (Ex. 546, R. 3941, 2605) would be "strictly construed" (R. 3089). However, it is apparent that the Court gave no effect whatever to its ruling.

Note: The ruling of the Court quoted in the next preceding footnote applies to these statements also. The pertinent exhibits are Ex. 542 (R. 3940, 2607) and Ex. 229 (R. 3818, 2606).

The opinions of the producer-distributors concerning the reasonableness of clearance are not to be regarded as authoritative for the purpose of the enforcement of the Sherman Act (*Paramount* case, 66 F. Supp. at 323). The producer-distributors test the reasonableness of clearance from the point of view of their own economic interest, not from the point of view of the Sherman Act. As the Court clearly pointed out in the *Paramount* case, the interests of the exhibitor and the interests of the producer-distributor differ in the matter of clearance. That the exhibitor has been successful in bargaining with the producer-distributor for clearance, to the extent that he obtains a clearance which the producer-distributor labels "unreasonable", "excessive" or "unfair", means only that the economic interest of the producer-distributor is not completely satisfied—not that the Sherman Act has been violated.

The admission of these inter-office memoranda is subject to many other objections including the general objections stated elsewhere in this brief. They are in addition replete with double hearsay. Furthermore, declarations of alleged co-conspirators are admissible only when in furtherance of the alleged conspiracy; and certainly the evident attempt of the producer-distributors by means of these communications to reduce Schine's clearances cannot be said to be in furtherance of any conspiracy by Schine to restrain trade by securing unreasonable clearances.

**FINDING 26**

Finding 26, which also deals with clearance (R. 3224), recites a clearly inadmissible inter-office communication of Fox, which has been quoted and commented upon under Point II. No further comment is necessary.

**FINDING 25**

Finding No. 25 reads as follows (R. 3224):

> "25. Lynch wrote United Artists that 'Schine' should be allowed the privilege of playing pictures ahead of a situation (Sodus) charging a lesser admission price.' To this the reply, in part, was: 'Therefore, in the future we will grant you fourteen days, or whatever clearance you see fit to take on towns like Elmira* etc. in that locality.'"

The reference here is to Exhibits 318 (R. 3846, 2604), and 319 (R. 3846, 2604), the first being a letter dated December 16, 1940, in which Lynch states that Schine's theatre in Newark should have clearance on United Artists' product over the theatre in Sodus which is showing that product at a lesser admission price than that charged at Schine's Newark theatre, and the second being United Artists' reply dated December 18, 1940. What alone is significant is the clearance that Schine's Newark theatre actually received on United Artists' product in the 1940-1941 season, since it is clearance actually given to Schine which the Court has found unreasonable. In that season Schine got 14 days clearance over Lyons, Palmyra, and Clyde (Ex. 959, R. 4397, 2537). This is to be compared with the clearance which Schine's theatre in Newark received on United Artists' product in the 1933-1934 season: 30 days over Lyons, Palmyra, and Clyde (Ex. 281, R. 3827, 2537). There is no evidence that these clearances were unreasonable.

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*In the letter referred to the town mentioned is Palmyra, not Elmira.

**FINDING 23**

Finding No. 23 reads as follows (R. 3224):

> "23. United Artists with respect to the Capitol Theatre in Ilion wrote: 'We do not want to encounter any difficulty with the Schine Circuit * * *, we want to be definitely assured that the clearance as submitted in the contracts is satisfactory to the Schine Company.'"

This finding is based on a United Artists' inter-office memorandum (Ex. 292, R. 3833, 2606) which appellants contended at the trial (R. 2586-87, 2594-96), and now contend, was not admissible for any purpose.

The whole memorandum reads as follows:

"UNITED ARTISTS CORPORATION

Inter Office Letter

Date, February 5th, 1936

From: (Office) Home, (Dept.) Sales, (Name) S. W. McGrath.

To: (Office) New York, (Dept.) Sales, (Name) Nat Beier.

Re: Ilion, N. Y., Capitol Theatre

It is necessary for us to hold the contracts recently submitted covered by #41's, #106747-#106751 inclusive.

Before considering the deal, we want to be absolutely certain as to the clearance following ten days after Herkimer.

We do not want to encounter any difficulty with the Schine Circuit insofar as clearance is concerned;

therefore, we want to be definitely assured that the clearance as submitted in the contracts is satisfactory to the Schine Company.

SWM:SS.

cc: Harry L. Gold, Chas. Stern."

It is evident that the only matter under consideration was the clearance of Schine's theatre in Herkimer over the Capitol Theatre in Ilion. In the 1933-1934 season, Herkimer had had 28 days clearance over Ilion on United Artists' product (Ex. 281, R. 3827, 2537). On April 20, 1935, Fox entered into the following agreement with the operator of the Capitol Theatre in Ilion (Ex. 873, R. 4378, 2376):

> "It is understood and agreed that in the event that all Major Companies serving Herkimer during season 1935-36 sell and serve Ilion with a Clearance of 10 days after Herkimer, The Fox Film Corporation's feature product and short subjects are to become available likewise."

It is evident then that what concerned United Artists was whether it should join (which it did—Ex. 869, R. 5573, 2369) a united front with the other distributors to reduce Schine's clearance over Herkimer to 10 days. That United Artists should in such circumstances be concerned with Schine's reaction is not unnatural, and far from indicating a conspiracy with Schine to restrain commerce, indicates to the contrary a purpose to thwart Schine's legitimate business interest, albeit in as genteel a fashion as possible.

In any event, whatever may have been United Artists' disposition concerning the granting of clearance to Schine in Herkimer the decisive question remains whether the clearance actually granted was unreasonable, and as pre-

viously pointed out at length, there is no evidence on which to base a finding that Herkimer's clearance over Ilion was unreasonable.

**Conclusion**

The Government in the Court below had a theory that clearance has no purpose except to protect the distributors' revenues, and that any clearance period that goes beyond that necessary (in the opinion of Government counsel) for such protection is "*per se* unreasonable." (Pl. Br., p. 44). This is a pat and convenient theory, which apparently the Court accepted. All other authorities who have spoken on the matter, however, have arrived at a contrary conclusion. *United States* v. *Paramount, supra; Gary Theatre Co.* v. *Columbia Pictures Corporation*, 120 F. (2d) 891; *Westway Theatre* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830, 113 F. (2d) 932; and see TNEC Report, quoted above.

The District Court's finding that appellants "secured unreasonable clearances" for their theatres over independent theatres is not supported by any evidence. The reasonableness of a particular clearance depends on a great variety of factors, as to which there are no adverse findings and no evidence on which such findings could be based. Furthermore, a great many of the clearances which the Court found unreasonable were clearances which could be imposed only on Schine's own theatres. It is evident, further, that in finding that Schine had secured unreasonable clearances the Court relied principally on inter-office communications of the producer-distributors, which were inadmissible for any purpose, and particularly inadmissible as proof of the unreasonableness of clearances, in which the producer-distributors had an interest adverse to the exhibitor.

The Court stated in its opinion (R. 3084): "It is recognized that the matter of clearances is of major importance in the consideration of the issues herein." The fact that the Court's erroneous findings with respect to clearance so strongly influenced its decision on the merits of the ultimate issue herein is a substantial ground on which the judgment and order herein should be reversed.

### 3. "Making threats to build or open closed theatres to prevent construction or operation by independents"

#### FINDING 10

Finding 10, which deals entirely with "threats to build," reads as follows:

> "'Schine' made threats to build in various towns, such as Paris, where there was a sign up, Canandaigua by a sign and newspaper article published, and where he eventually did build. In Perry, a statement by May and a newspaper article announcing that land had been bought for theatre purposes came at a time when 'Schine' was trying to purchase the independent's lease. 'Schine' did not build, but later got the lease. In Salamanca, just after independents acquired a site for a contemplated theatre, through the press 'Schine' announced its intention to build. In Medina, 'Schine' announced the making of an agreement to erect a new theatre immediately after independents started construction. In Mount Vernon, May contacted the independent to buy, saying 'Schine' would build unless the deal could be put through." (R. 3217).

The language used by the Court in the above finding would compel the reader to conclude that Schine threatened

to build theatres in all six of the towns cited, but that there was only one—Canandaigua—where it "eventually did build." In actuality, however, the evidence shows incontrovertibly that Schine "eventually did build" in four of those 6 towns and that it leased theatres, thus obviating the need to build, in the other two. The evidence, by towns, is as follows:

**Paris**

In November, 1936, when Schine bought the 634-seat Bourbon Theatre in Paris, Kentucky, it was the only theatre in the town. In 1937 Schine decided to build a new theatre in the town, bought a site and put up a sign on the building advertising the projected new theatre (R. 2038-39); and on October 5, 1937, the City Council passed an ordinance authorizing construction of the new Schine theatre (Exs. D-153, D-153-A, R. 5185, 5187, 2686). In the "spring or summer" of 1938, contractors' bids on the new theatre were received, and the theatre was begun and completed in 1939 (R. 2686-87).

Meanwhile, according to his own testimony in the case (R. 2038), Harry Schwartz, operator of a theatre in Lexington, had driven through Paris in the summer of 1937, and had noticed the announcement that Schine was going to build. In the following summer, 1938, Mr. Schwartz again drove through Paris and noticed that the sign was in a broken-down condition (R. 2038-39). Schwartz leased a piece of property in Paris in November, 1938, and in July, 1939, he commenced to put up a building on the premises, a few days before construction of the Schine theatre was begun (R. 2043-44).

Schwartz testified that two days after he signed his lease in November, 1938, a Schine representative, Mr. Lazar,

called him on the telephone and told him that Schine "had every intention of building a theatre in Paris" but had "not decided on just what type or what size, and that is why they had not begun earlier" (R. 2044-46). According to Schwartz, he and Lazar met later that day and Lazar told him the town would not support three theatres and that he was making a mistake to try to compete with Schine. Schwartz continued: "He said, 'If you care to, I will take this lease off your hands, and I said 'For how much?' and he said, 'Are you trying to hold me up?' " (R. 2044-46).

Schwartz next applied to distributors for product in Paris. For that purpose he selected the 3 distributors whose pictures Schine was then playing in Paris and he was advised—as no doubt he expected to be advised—that Schine was their customer in Paris and had already spoken for the second runs.* Nevertheless, Schwartz was not deterred, although it was his opinion "Paris was not big enough for more than two theatres" (R. 2056). Without going to any other distributors for product, he went ahead and partially erected the side walls of a building on his leasehold (R. 2047). At that stage, Lazar again made him an offer, which Schwartz accepted, for the Paris lease and a theatre that Schwartz was operating in Lexington. Schwartz admitted that in his dealings with the Schine interests he met only with courtesy and fair discussion, and that no threats were made to him (R. 2056-57).

There is no evidence of Schine's "threat to build" in Paris other than what is summarized above. That evidence, it is submitted, permits only one fair inference: that if any threats were made in Paris, they were made, not by Schine

*This aspect of the competition in Paris is discussed in more detail in the attack on Finding 18.

but by Schwartz, who (1) did not lease a site until he knew Schine was planning to build a second theatre, (2) went ahead with his bluff and erected walls, even though he had obtained no product and even though he admitted the town would not support 3 theatres, (3) sold out to Schine as soon as he got an offer which he thought represented his maximum nuisance value.

**Canandaigua**

The Playhouse Theatre in Canandaigua, which Schine bought in 1924, was for many years the only theatre in the town. In 1937 Schine began to consider the construction of an additional theatre in Canandaigua, in view of a report that a large government hospital was going to be built in the town, which it was expected would bring several hundred additional families to Canandaigua (R. 2645-47). In 1938 Schine put up a sign in Canandaigua, on what was known as the Flanagan property, advertising that a new theatre was going to be constructed (R. 1977-78), and in May of that year the local newspaper carried a story on Schine's plan to build a new theatre in the town (Ex. 53, R. 3783, 2544). In 1939 Schine acquired a site, half a block away from the Flanagan lot, on which it did build. During the ensuing construction one of the walls collapsed and a worker was killed and, as a result, the project was tied up for some time by litigation. The theatre was finally completed and opened in April, 1941 (R. 2647-48; 224).

In April, 1938, two other interests appear to have been attracted by the prospects in Canandaigua. In that month Richard De Toto, according to his testimony discussed with a Mr. Marks the possibility of building a new

theatre in Canandaigua. Nothing ever came of those discussions; why, is not clear, but there is no suggestion or implication in the evidence that it had anything to do with "threats" by Schine. The discussions simply never got beyond the preliminary stage (R. 960-61).

The other individuals who contemplated building a theatre in Canandaigua were Hubert P. Wallace, who operated the Capitol Theatre in Auburn, and Anthony Lauer. Wallace and Lauer had their eye on a piece of property abutting Schine's Playhouse Theatre and known as the Jenkins lot. Although they had seen Schine's sign advertising the new theatre and although they had read the newspaper article on Schine's plans, Wallace and Lauer went ahead and made an offer for the Jenkins lot (R. 1976-77). That offer was rejected by the estate which owned the property (Ex. D-174, R. 5191, 2942), and Wallace and Lauer then abandoned their plan. There is nothing in the evidence that could possibly be construed as indicating that Wallace and Lauer were intimidated by any "threats" by Schine. On the contrary, they went ahead and made an offer to buy in the face of information that Schine was planning to build.

The Lake Theatre, which Schine began in 1939 and finally finished in April, 1941, represented an initial expense of $15,000, and building and improvements valued at an additional $38,500 (Ex. D-130, R. 5183, 2634). It ran continuously for 4 or 5 months after it opened, but it lost money and had to close. The expected increase in population did not materialize and the Lake has since been operated only part-time, when business justified (R. 2648, 2414).

The worst that can be said about this situation, upon any construction of the evidence, and drawing all inferences in favor of the Government, is that Schine heard that two

competing groups were considering building a theatre in Canandaigua and decided to beat them to the punch by building one itself. To apply the word "threat" to such a state of affairs is, to say the least, a novel use of the word.

**Perry**

In November, 1934, an official of Universal wrote Schine that the Auditorium Theatre in Perry, being the only theatre there, was doing a large business and that Schine might be interested in Perry (Ex. 361, R. 3884, 2605). Schine looked into the situation and in July, 1935, bought a vacant lot on the main street belonging to Porter Davis (R. 1851). On October 4, 1935, Schine solicited and received bids for the construction of a theatre in Perry (R. 2684-85).

In July appellant May had called on J. C. Herzberger, the operator of the Auditorium, and said that he hoped they would be friends (R. 1849-51). He told Herzberger that Schine had just bought the Davis lot and that it was going to put up a new theatre seating 1,000 persons and costing about $100,000 (R. 1848-51). In the summer of 1935 the local newspaper, the *Perry Record*, ran an article on the fact that Schine had bought a piece of property in the town and had received contractors' bids for a theatre (Ex. 807, R. 5218, 2289).

Sometime later a Warner representative arranged for Herzberger to meet J. Myer Schine in Rochester and at that time Mr. Schine offered Herzberger $5,000 for his lease on the Auditorium (R. 1853-55). Herzberger accepted the offer, subject to the consent of the Town Board, which was necessary (R. 1854-55). The Town Board first refused, but finally left it up to Herzberger to decide whether to sell,

and he then decided he would not sell to Schine after all, and accordingly continued to operate the Auditorium himself (R. 1856-57). Thereafter he received a better offer from competitors of Schine, the Dipson Circuit, and that offer he decided to accept (R. 1857).

The Auditorium was an old theatre, built before the turn of the century. The Dipson Circuit spent $13,000 to improve and rebuild the theatre, increasing the seating capacity to 700 and making it a modern motion picture house. Schine did not go through with its plan to build a second theatre, since the rebuilding of the Auditorium, as Herzberger himself testified, "removed any occasion for having another theatre built in (Perry)" (R. 1858-60). A year later, however, Schine offered to buy the Auditorium lease from the Dipson Circuit, and they sold it to Schine (R. 1855-56). There is no word of testimony anywhere in the record to suggest that Dipson was motivated by any "threat" by Schine or by anything except an offer that was too attractive to resist.

**Salamanca**

Schine entered Salamanca, N. Y., in 1924, by acquiring the Andrews, the only theatre in town. In July, 1927, Schine bought a second piece of property in Salamanca, and it was on that piece of property that Schine began construction of its new theatre, the Seneca, eleven years later (R. 2063-64). Specifications for the Seneca Theatre were sent to the architect on August 23, 1938. On December 24, 1938, the *Salamanca Republican Press* reported that Schine was going ahead with plans to build a new theatre in the town (Ex. 854, R. 5221, 2292). Construction was started in 1939 (R. 2064-65). Thereafter, work on the

Seneca was held up for almost 2 years by a shortage of materials (R. 2715-18). In 1941, the Common Council of Salamanca approved the final plans and specifications for the theatre (R. 2981), and construction was completed in August, 1942 (R. 2717-18). The finished theatre was modern, air-conditioned, seating approximately 1200, and was, in the words of the local newspaper editor, a "very lovely theatre" (R. 2292-93).

The only evidence that any other interests ever contemplated the possibility of building in Salamanca was the testimony of Irving Cohen, who has been mentioned as the owner of a third-run theatre in Corning. Cohen testified that in 1937 he made "two or three visits to Salamanca" to look over the situation there, and that in October, 1938—by which time Schine had already sent specifications for the Seneca Theatre to the architect—he and two associates investigated theatre sites in Salamanca and looked at several pieces of property (R. 2209-12). No one ever spoke or wrote to Cohen to attempt to persuade him not to compete in Salamanca. In response to a question put to him, Cohen said that he had read the newspaper account of Schine's plans (R. 2209-10), but he did not say or imply that it was the "threat" of a second Schine theatre in the town that made him decide not to buy. In fact, although Cohen had been studying the situation in Salamanca for over a year before the newspaper account of Schine's plan appeared, he had never even made an offer for a piece of property, let alone hiring an architect, or asking for bids.

To summarize: Schine, having had the only theatre in Salamanca for many years—and having considered the construction of another theatre and bought a lot for that purpose as early as 1927—decided in 1938 to build a new

theatre there. After Schine had commissioned an architect for the theatre, a potential competitor inspected several possible sites in the town. Some months later the competitor read in a newspaper that Schine was building a second theatre. It was that evidence, and that alone, which the Court felt justified its finding that Schine had used "threats" to discourage competition in Salamanca.

**FINDING 11**

Finding 11, dealing with "statements to independents which are reasonably construed as threats", consists of 9 instances, set forth in paragraphs (a) to (i), inclusive, and covers nearly 3 pages in the printed record. Each of the 9 instances is either trivial, inaccurate or flatly wrong. Paragraphs (c) to (f), inclusive, dealing respectively with the towns of Norwalk, Van Wert, Lockport and Perry, have been discussed above in connection with the other findings dealing with those towns.

Finding 11(a) reads as follows:

> "At Bellefontaine, during negotiations for the renewal of a lease with an independent, Lazar threatened to reopen the Opera House if the independent opened the Strand."

The first comment to be made on this finding is that it did not involve an "independent" at all, but rather the owner of a theatre—the Strand—which Schine had under lease. When the time came to discuss terms for renewal of the lease in 1940, the parties had some difficulty in coming to terms—especially about the number of weeks that Schine would bind itself to keep the theatre open during a year, the Strand being a marginal theatre that was operated only part

time. The owner, Gutilla, had a son who was running a theatre in another town; and when there was reluctance on Schine's part to meet Gutilla's terms, the latter threatened not to renew the lease, but to open the theatre himself. Schine's representative, in the heat of negotiations, said that in that event Schine would open the Opera House, another marginal theatre that was then closed (R. 1345-46). This amounted to no more than the assertion that, if he could not get the Strand, he had another theatre available for the same purpose. How, in connection with a business noted for "horse-trading", such an incident can be regarded as significant, it is difficult to see.

Finding 11(b), omitting that part of it that relates to Paris, Ky., which has already been discussed, is:

> "With reference to Paris, Lazar told the independent, who was taking steps to build, that if the independent went ahead with his projects 'Schine' would build a 1200 seat theatre in Lexington where the independent had a theatre and that the house would be run with 10¢ policy at all times."

This story is so ridiculous on its face as to be unworthy of credence. Schine was the principal theatre operator in Lexington, having 4 of the 6 theatres, including all the first-run and second-run houses. One of the other 2 theatres was run by Harry Schwartz who, as explained above, started to build a theatre in Paris after he learned that Schine was going to build one. The story related is that Schine would put up a 1200-seat theatre in Lexington and run it with an admission price of 10¢. If anything could be calculated to destroy the profitableness of Schine's own theatres in Lexington, it would be such a fantastic operation.

Apart from that, the story cropped up quite incidentally in the record; the witness who testified to it was not Schwartz himself but another operator in another town. He never claimed that he or any one had repeated the "threat" to Schwartz, let alone that Schine had repeated it to Schwartz; and Schwartz, who testified, was not questioned on the subject and did not mention it. Schwartz testified that Schine made no threats to him (R. 2056-57).

In other words, the alleged threat was not made to "the independent" but to a third party who never communicated it to the "independent"! And when the testimony of the alleged threat was given, *the Court struck it from the record* (R. 858). The finding is hardly more than frivolous.

Finding 11(f), which deals with Perry, has been discussed above, in connection with Finding 10.

Finding 11(g) states:

> "Insley and May tried to buy an independent's theatre at Seaford and Georgetown. Insley said it was foolish that the independent did not make a deal with 'Schine' because he had recently purchased the theatre at Laurel and 'very likely, with the buying power they had they would get away the product' from the independent. Insley said Schine had bought a lot with the intention to build a theatre in Seaford, and also said: 'Well, if I were you I would sell the theatres to Schine because hey are going to build a theatre there and, naturally, they are going to get the product.' Insley, under a written contract with 'Schine', had authority 'in negotiations for the acquisition of motion picture theatres within the above-described territory' (Delaware, Maryland, Virginia). Seaford and Georgetown are in Delaware."

If Insley, a local Schine manager, made the quoted statements, his remarks were as ineffective as they were inappropriate, for Ayers turned him down with a flat "not interested". Not only did Schine not get a theatre in Seaford or Georgetown (a fact that is characteristically omitted from the finding) but Ayers went ahead with his own plans to build a new theatre in Seaford, and at the time when he testified he was operating 2 theatres in that town (R. 2070-78). Thus, the finding is irrelevant.

Finding 11(h) states:

> "At Rochester, J. Myer Schine told independents, who were then building the 'Webster', that the location was not appropriate, that it was too near the 'State' (Schine's) and not justified, and Schine said he would build a theatre near the Murray theatre (owned by independents). The 'State' and the 'Webster' theatres were 3/4 mile apart. Schine later took over the 'Webster'. Schine testified he said that it would not be sensible to build the 'Webster', but denied that he said he would build near the 'Murray'."

The "independents" referred to in this finding were a firm of theatre operators, Messrs. Tishkoff & Fogel. In 1927 Schine had 4 theatres in Rochester, one of which, the State, had neighborhood competition from the opposition Plaza Theatre. In 1927 Messrs. Tishkoff & Fogel began to erect still a third theatre in the vicinity, the Webster. J. Myer Schine testified that he called on Messrs. Tishkoff & Fogel, who also owned the Murray in another part of the town, and that he said:

> "there was no sense to it, any more than there would be sense in building a theatre in the neighborhood near the Murray Theatre" (R. 2654).

Nevertheless, Tishkoff & Fogel went ahead and built the Webster Theatre and then offered Schine a half interest in it, which Schine bought.

There was conflicting testimony as to whether the statement made by J. Myer Schine in 1927 (17 years before the trial) was as Mr. Schine testified (quoted above), or whether, as testified by Tishkoff on direct examination, Schine at that time had threatened, in reprisal, to build a theatre near one of the Tishkoff & Fogel theatres.

In resolving that conflict against Schine, the Court simply ignored the testimony of Tishkoff on cross-examination, where he admitted that what Schine had actually said, in the conversation in question, was that it was no more sensible to build an additional theatre in the neighborhood of Schine's State Theatre than it would have been to build one in the neighborhood of Tishkoff & Fogel's Murray Theatre (R. 2231). In the one case Schine did not think there was enough business for a second theatre (R. 2653-55), and in the other case Tishkoff held the same opinion (R. 2655).

Any court would be hesitant about putting too great reliance on testimony given 17 years after the event, when it concerns the precise language of a conversation. But to give credence to such testimony, when the witness himself has contradicted it on cross-examination, is most extraordinary.

Finding 11(i) states:

> "At Seneca Falls, after an independent had taken steps toward building a theatre, a sign was placed on the Seneca Theatre, (shortly theretofore purchased by Schine) which read: 'Closed for alterations. Will reopen soon as a Schine theatre.' Independent then discontinued efforts to build. 'Schine'

did not reopen. Practically the same things recurred two years later. The same independent took steps to build. The sign re-appeared on the 'Seneca.' The independent did not go through with his plan. The 'Seneca' did not open. It had not been open in several years."

This finding is based on the testimony of Richard De Toto who had operated the Seneca Theatre in Seneca Falls before Schine took it over and closed it. Schine operated the big theatre in Seneca Falls, the Strand, seating about 900. De Toto testified that in May, 1936, he investigated an "old laundry building" in Seneca Falls with the idea of converting it into a theatre, and that two years later, in June, 1938, he discussed the "converting a garage" in the town but that in each case he decided not to go through with his plans because he saw a sign on the Seneca Theatre announcing that it would reopen (R. 897-98, 902-03).

There is no evidence that De Toto ever spoke to any representative of Schine about his contemplated project, which never got beyond the most preliminary stage, or that Schine or any representative of Schine was aware of either of De Toto's "investigations" in Seneca Falls. All that appears is that De Toto, *having in his mind* the possibility of opening a theatre in the town, went to the town in May, 1936, and again in June, 1938, and each time, when passing the closed theatre, saw a sign announcing that Schine was going to open it.

As is repeatedly illustrated in the record, it was the custom of Schine to announce the opening of theatres by means of such signs. In the other cases the theatres were opened. In Seneca Falls the announced plan was never carried out; the record does not disclose why.

It may be permissible to infer, though it is an extreme inference, that except for the signs De Toto would have gone ahead with the contemplated project. But to pile upon that inference a further inference that the sign was put up to discourage De Toto in his undisclosed project, and that it "reappeared" at the time of De Toto's second visit—when for all that the record shows the sign was there throughout the 2-year interval and may still be there—is an error of the most fundamental character in dealing with evidence.

It is submitted that the whole of the Court's findings on "threats" is nothing more than the piecing together of a series of inconsequential details, taken out of their context of circumstances and time, and presented with characterizations which give them a significance that they never could have had in the actual times and circumstances involved.

**4. "Lowering admission prices"**

**FINDING 14**

Finding 14 reads as follows:

> "'Schine' cut admission prices at Corbin, Geneva, Lexington, Malone, Ogdensburg and other towns; gave out cut rate tickets in Addison, good in his Corning theatre for students, and frequently engaged in two for ones and bank nights in other towns."

The mere inclusion of any paragraph such as this in the findings serves to illustrate the Court's prevailing misconception as to both the economic theory underlying the Sherman Act and the practical operation of all American business, including the highly competitive motion picture business.

Of course, Schine engaged in price competition, as well as many other forms of competition. When the situation required special efforts to attract the public to a particular theatre, Schine employed cut-rate tickets, two-for-ones and bank nights. And of course—and this is what the Court neglected to include in its finding, though there was certainly more than ample evidence of it—Schine's competitors all utilized the same devices. But the most important and most obvious point is, not that all of these competitive tactics were common throughout the industry, but that their adoption by Schine or anyone else has nothing to do with the anti-trust laws. These methods were aimed at attracting customers, away from the opposition theatres in open towns, and away from their radios in closed towns. However annoying bingo games and give-aways and the various other "added attractions" may have become to customers who want only to see a good picture, they nevertheless represent examples of the very competition which the Sherman Act is designed to foster.

The following is a brief digest of the evidence concerning the six towns cited in the Finding:

**Corbin**

The 2 Schine theatres in Corbin were the Kentucky and the Hippodrome. The opposition Viv Theatre was run by Mitchell K. Murphy, who modestly admitted, although he had been in the business 32 years, "I don't profess to be any professional theatre man." (R. 774-75, 793-95).

Murphy testified that he employed give-aways in Corbin, that he "sometimes" operated on a two-for-one policy, that he had a bargain day one day a week at the Viv Theatre, during which he charged an adult admission price of

only 10¢, and that "there was a time or two" when children were charged 5¢ (R. 801-04).

The sole evidence as to Schine's lowering of admission prices in Corbin was Murphy's testimony that after the Viv was opened the Hippodrome, which had been charging 25¢ throughout the house, lowered the price of balcony seats to 15¢. Murphy added that when he thereafter sold the Viv to Schine the Hippodrome prices were again raised to 30¢ (R. 790-91).

When a theatre like the Viv charges 10¢ for adults and 5¢ for children, and institutes a give-away and two-for-one policy, a rival theatre like the Hippodrome has to lower its prices if it is to meet the competition.

**Geneva**

Richard De Toto testified that after the closing of the Park Theatre in Geneva, for which De Toto bought and booked product, the admission price at Schine's Regent Theatre in Geneva was raised from 20¢ to 30¢ and that still later it went up to 40¢ (R. 916-17). There is no other evidence in the record regarding the raising—or the lowering—of prices in Geneva.

In other words, there was no evidence that Schine "cut" prices in Geneva, but only that it raised prices. Perhaps, if that had been pointed out to the Court, it would have added a separate finding on the raising of prices. Such a finding, it is submitted, could not have been any more irrelevant than the present one.

**Lexington**

Schine's price competition in Lexington is discussed above in detail, under Finding 22. As pointed out there,

the Schine policy of lower admission prices was instituted only as a summer measure, and prices were raised again in the fall. Harry Schwartz, Schine's opposition in Lexington, testified that Schine's admission prices were not cut in the summer of 1939 but only in the summers of 1937 and 1938 (R. 2052-53). Schwartz added that during those summers he himself maintained the usual price at the Opera House of 10¢ for matinees and 16¢ at night (R. 2030-37).

**Malone**

There was spirited price competition in Malone. Michael Boumansour opened the Plaza Theatre in Malone in the fall of 1936. He played double features exclusively and charged a 25¢ admission price (R. 2264-65). Boumansour testified that soon after he opened the Plaza he adopted a scheme of inserting advertisements in the local newspaper, offering to admit two adults for 25¢, upon presentation of a copy of the advertisement at the theatre box-office. He also instituted a dish give-away and a bingo game (R. 2324-26). The Schine theatre in Malone was changing its program 3 or 4 times a week and was alternating between double features and single features. It charged 40¢ in the orchestra and 30¢ in the balcony (R. 2264-66). Boumansour testified that when he changed to second-run pictures in the summer of 1938, the Schine Theatre lowered its admission prices from 40¢ to 30¢ in the orchestra and from 30¢ to 20¢ in the balcony, and also introduced give-away nights (R. 2268-69, 2275-76). Boumansour then began charging 15¢ between 6:30 and 7:00 o'clock in the evening. Thereafter Schine reduced its prices to 15¢ in the balcony, and 15¢ in the orchestra from 7:00 to 7:30 in the evening (R. 2276, 2295-96).

**Ogdensburg**

Lawrence J. Carkey, who had once managed a Schine theatre in Ogdensburg, testified that in the summer of 1940 he considered erecting a theatre of his own in the town. Carkey said that "sometime in August or September" he had plans prepared by an architect and contemplated signing a lease but that he did not go through with the plan (R. 2392-94). The only evidence in the record as to a cut in admission prices in Ogdensburg was an announcement in the local newspaper of September 26, 1940, stating that Schine was going to open the Pontiac Theatre full-time on the following Friday—the Pontiac had previously been open only on week-ends—and that "all programs will be double features, one a first-run picture, the other picture second-run and that admission prices will also be reduced" (Ex. 884,* R. ~~3576~~ 2406).

**Addison**

Walter A. Smith operated the only theatre in Addison, a town of about 1400 people, which got pictures 30 days after first run in nearby Corning (R. 1862-64). The admission prices at the 3 Corning theatres were 10¢ and 25¢ at the Palace, 10¢ and 20¢ at the State and 40¢ and 25¢ at the Fox, with a price of 10¢ for children (R. 1862-63). In the year 1937 and for about two years thereafter Schine issued "student tickets" which admitted "students" to its Corning theatres on week nights for 15¢ (R. 1863-65). Smith testified that he thought the Corning student tickets hurt his business in Addison, and said that he had gone to see a Warner representative to complain about the matter,

*This exhibit is not part of the printed record but, by stipulation, may be referred to (R. 3553).

and that the latter then suggested that he employ the same device himself, but that he did not want to do it because he did not have enough seats (R. 1865-67). Smith said that the student tickets were distributed in Addison only once (R. 1867-68).

It is nothing less than shocking that, on the basis of such evidence as that above summarized, the Court could have found that "The means and methods employed by" Schine "to obtain a 'monopolistic' control" in the theatre business included "lowering admission prices" (R. 3215).

**FINDINGS 9(c) AND 22**

While Finding 8 makes no reference to the subject of minimum admission prices, Findings 9(c) and 22 refer to that subject.

Finding 9(c) reads as follows:

> "The license contracts with 'Schine' in many instances specified minimum admission prices for the various runs as well as clearance periods. This affects adversely the time given the competitor."

We do not comment here on Finding 9(c), because we are unable to understand what it means. It is discussed under Point IV.

It seems unnecessary to quote Finding 22, which is approximately a page long. It deals particularly with minimum admission prices which the distributors included in their contracts for theatres in Corning and Lexington. It states that "In certain instances Schine's film contracts called for lower minimum admission charge than those for the independent for subsequent run," and that "Minimum admission prices were omitted from Schine's contracts,

although the contracts of his independent competitors specified minimum admission prices."

We shall take up the specific cases referred to in Finding 22.

**Corning**

The Court found that the distributors' contracts for Schine's opposition, the Plaza Theatre, prohibited a minimum admission price of less than 15 cents, whereas in 1933-34 neither Loew's nor Universal had any minimum admission clause in their contracts for Schine's State, and whereas Fox, both in 1933-34 and 1934-35, had no minimum admission clause in its contracts for Schine's State or for Schine's Fox. The Court also found that the Fox contracts for 1933-34 permitted Schine's State, with a 60-day clearance over the Plaza, to charge an admission price five cents lower than the Plaza.

The facts selected by the Court for its finding on Corning invite comparison with the evidence which the Government itself introduced on the subject. Irving Cohen, who owned the Plaza, testified that the price his theatre charged in 1933-34 was 25¢, and that none of Schine's theatres charged less (R. 2200-02). In other words, although the Court chose to base a finding on the fact that in 1933-34 the Plaza was prevented by contracts with distributors from charging less than 15¢, the Court saw no need to point out that the Plaza actually charged 25¢ that year, 10¢ over the minimum specified in the contracts referred to.

Further, although the Court chose to base a finding on the fact that Schine's State had a 15¢ minimum in its 1933-34 contract with Fox, whereas the Plaza had a 20¢ minimum in its contract with Fox, the Court saw no

need to point out that both theatres actually played Fox pictures that year at a 25¢ minimum.

Finally, although the Court chose to base a finding on the fact that Loew's and Universal had no minimum clauses in their 1933-34 contracts with Schine, but that all the distributors had clauses in their contracts for the Plaza fixing minimum admission of 15¢, the Court nevertheless saw no need to point out that none of Schine's theatres charged an admission price of less than 25¢ and that the Plaza likewise did not reduce its price below 25¢.

The finding on Corning is not only incomplete and misemphasized, but it is also, of course, meaningless. It is a finding on the activities and practices of distributors. It deals with contract terms imposed by distributors; it does not even imply that Schine suggested those terms to the distributors; and there could have been no such finding or inference or suggestion, for there would be no evidence whatever to support it.

**Lexington**

That part of the Finding 22 which relates to Lexington is equally misleading and equally meaningless.

The Court found that Fox had a first-run minimum admission price clause in its 1936-37 contract with Schine; that Schine cut prices during the summer months to below the prescribed minimum; that Harry Schwartz, the proprietor of the Opera House, a 15¢ and 10¢ house, complained to Fox (and to Paramount); and that, in response to an inquiry from Fox, Schine replied that the lowering of prices was made for the summer and that it was "quite essential and proved to be beneficial" (Ex. 202, R. 3811, 2241). The Court also found that Fox thereafter omitted mini-

mum admission price requirements in the Schine second and third-run contracts, but imposed a fifteen cent minimum admission price in its contracts with the opposition theatre.

It seemed to be the view of the Government below that, inasmuch as there were minimum admission prices in the contracts of other exhibitors in and around Lexington, Schine's action in breaking its contract with Fox, in order to get business during the severe heat of the summer in Lexington, was somehow or other a violation of the rights of other theatre operators. But in the *Paramount* case the court condemned and enjoined the fixing of minimum admission prices, and Schine's action—while from the standpoint of Fox it was a breach of contract—was fully in accord with what the court in the *Paramount* case regarded as the type of action that the theatre operator should be free to take in such a situation.

If Fox continued to put minimum admission prices in the contracts of other exhibitors in the Lexington area it was not done at Schine's instance, it was not for Schine's benefit, and it was not Schine's fault.

The finding on Lexington, like the finding on Corning, traces a course of unilateral practices by distributors and is without relevance in an action against exhibitors.

**5. "Obtaining rental concessions"**

**FINDINGS 20 AND 27**

Finding 20, dealing with special film rental concessions, reads as follows:

> "Special privileges were granted, as in the option of paying a per cent of the gross receipts from product or a flat rental, and as in deducting cost of competitive devices (bank nights, etc.) from gross

before computing the distributor's share. In certain instances the distributors made contracts providing for film rental based upon a percentage of the gross receipts and in certain other instances, the rental was a flat rental. When a percentage picture was played, with a competitive device (bank nights, etc.) sometimes provision was made for the deduction from the gross receipts of the cost of such competitive device before computing the distributor's rental. These provisions were also in contracts with independents."

Nowhere is the Court's persistent misemphasis better illustrated than by its passing mention, at the very conclusion of this finding, that the various special provisions granted to Schine "were also in contracts with independents." In its brief in the District Court the Government, while admitting that "Schine's film rentals as such have no direct restraining effect on independent opposition", maintained that "the granting to Schine of special privileges not open to independents must be considered in determining the competitive effect of Schine's buying power" (p. 47). But not even the Government has urged that any significance could be attached to the granting of privileges to Schine when the same privileges were also granted to Schine's opposition.

Finding 27 reads as follows:

> "27. There is much other evidence going to show the influence of 'Schine' with the distributors to gain preference over independent competitors, and also the cooperation of the distributors with 'Schine' to the same end."

As indicated under Point II, most of the "other evidence" is inadmissible.

If Finding 27 means that Schine was more successful than its business competitors in various instances, or that it took full advantage of the opportunities presented by the distributors' method of selling, or that it sometimes made better trades with the distributors than its competitors, it is wholly inconclusive as a basis for an ultimate finding for conspiracy or motive.

We do not know what else it could mean.

### 6. "Restricting independents who sold to Schine as to periods and places of operation"

#### FINDING 15

Finding 15 deals with covenants not to compete, and reads as follows:

> "In cases of purchase or the assumption of leases other than those hereinbefore referred to, the agreements therefor provided for no competition by the independents for long periods of time. The non-competitive feature was also extended to cover outside towns, *i.e.*: Amsterdam, Ilion, Malone, Paris, and Lexington."

We point out, as an indication of the misleading character of the findings as a whole, that although Finding 15 purports to list only towns "other than those hereinbefore referred to," it actually includes both Paris and Lexington, which were *the only* towns referred to in any previous mention of covenants not to compete (Finding 11(b)).

It will be noted that the Court gave no reasons why the covenant in any instance that it cited was unreasonable as to time or area. It simply lumped all the covenants together in one sweeping denunciation, accepting the theory advanced

by Government counsel that these agreements "obviously" had "no relation to the preservation of the good will of the business sold but were simply intended to protect Schine from competition" (Pl. Br., p. 28), and apparently relying on the reference which this Court made in the *Crescent* case (323 U. S. at 173) to covenants not to compete, in the entirely different situation which that case presented.

It seems hardly necessary to point out to this Court that there is no more common provision in contracts for the sale of business properties than the covenant not to compete. Of course such covenants "protect" the vendee from competition of the vendor. That is their purpose. They are intended to "restrain" competition. Whether they are lawful is to be determined, not by whether they restrain competition, but by whether the covenant is ancillary to the sale of a business property, is founded upon good consideration, and is reasonably limited as to time and area. *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 280-82, 175 U. S. 211; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 567-68. Such covenants are lawful in both New York and Kentucky, the 2 states in which are the towns mentioned in Finding 15. *Metropolitan Opera Co.* v. *Hammerstein*, 162 App. Div. 691, 700-02, *aff'd.* 221 N. Y. 507; *Elkins* v. *Barclay*, 243 Ky. 144. As the Court said in the *Paramount* case (66 F. Supp. at 341):

> "* * * At common law a vendor of income-producing property may validly covenant with his purchaser not to compete for a given time or within a given area so long as the restrictions are reasonably necessary to protect the value of the property purchased." [Citing *Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179; *Rogers* v. *Parry*, 2 Cro. 326 (K. B. 1613); and the *Addyston Pipe* case, cited *supra.*]

We shall discuss briefly the specific cases mentioned in Finding 15.

**Amsterdam**

In 1937, because he realized that Amsterdam, New York, "wasn't large enough to maintain two second-run theatres" (R. 1710), Kronick, the competing exhibitor, went on his own initiative to see Myer Schine to talk about a deal for the sale of his Orpheum Theatre (R. 1717). In May, 1941, Kronick sold to Schine the good will and equipment, the furniture and fixtures of the Orpheum for $7,000 (R. 1707). Kronick testified that at the time of the sale he also agreed not to engage in the same line of business in the City of Amsterdam for a period of five or six years (he could not recall which) (R. 1709). Kronick's testimony concerning this agreement was accepted because the contract evidencing the agreement was not produced at the trial.

The covenant having been limited to the City of Amsterdam, and extending for only five or six years, was clearly reasonable under the rules laid down by the authorities above cited. The Court's statement that the covenant in this situation was "extended to cover outside towns" is simply erroneous and is one of the innumerable inaccuracies in the findings.

**Ilion**

Pursuant to an agreement dated December 10, 1936 (Ex. 871, R. 5221, 2368), Schine bought the Capitol Theatre and the Opera House in Ilion for $250,000 from Young & Whitney, Inc., the fee owners and acquired from the same owners a lease of the Temple Theatre for a term of 5 years at a rental of $1,750 a year (Ex. 85, R. 5195, 2522).

As an incident to this transaction, Frank Whitney and Robert Pierce, president and secretary, respectively, of Young & Whitney, Inc., agreed that they would not for a period of ten years "engage in the operation of any motion picture or other theatre or theatres, or any similar business in the Village of Ilion, or within a radius of thirty-five (35) miles of said Village of Ilion, New York" (Ex. 872, R. 5223, 2368).

Here again is a covenant, limited to a narrow area and to a reasonable period of years—and in a transaction involving very large sums of money—which under all the authorities, and specifically under the law of New York (*Metropolitan Opera Company* v. *Hammerstein, supra*), was entirely lawful.

**Malone**

Schine held the Plaza Theatre in Malone from 1929 to 1936 (R. 2253-54), when the lease expired. Then the owner, Boumansour (who had owned the theatre since 1922), took over the operation of it and ran it for 5 years in competition with Schine (R. 2256). In February, 1941, Schine reacquired a leasehold interest in the Plaza for a period of ten years at $8,000 a year (Ex. 81, R. 5193, 2300).

In connection with the acquisition of the lease, Schine agreed to employ Boumansour for one year at $70 a week as manager of the Plaza (R. 2301), and Boumansour agreed to deliver to Schine an agreement not to engage in the motion picture business in Malone or in any town in which Schine operated a moving picture theatre, or within a radius of twenty miles thereof during the term of the lease (Ex. 82, R. 3789, 2300). Boumansour remained as manager of the Plaza for two years (R. 2301).

Boumansour, when asked at the trial as to the terms of the lease to Schine, testified, "I gave them my terms, and it was perfectly O.K." (R. 2299). On April 4, 1941, Boumansour wrote the Department of Justice that he had disposed of his theatre "as planned" and "everything is satisfactory here" (Ex. D-133, R. 5176, 2305).

Again the covenant was limited as to area and, we believe, reasonable as to time, especially when coupled with the employment of the vendor by the vendee.

**Paris and Lexington**

These two situations are discussed together because the covenant not to compete was made in connection with a transaction involving both towns. This is a case where the covenant was justified, not only on the basis of legal principles, but because of the activities of the particular individual from whom the covenant was taken.

Schwartz owned the Opera House at Lexington, a 15¢ and 10¢ house. After he learned that Schine was going to build a theatre in Paris, Schwartz rented a piece of land in Paris and commenced putting up a building—though Schine's plans for its new theatre had been completed and construction was to begin in a few days (R. 2038-39) and although Schwartz himself testified that the town, which up to that time had had only one theatre, could not support more than two (R. 2056). This situation has been discussed under Findings 10 and 11, from which it is entirely clear that Schwartz presented Schine with the alternative of buying him out or going ahead with a theatre which, if Schwartz built his, would be at most a dubious venture in a town that could not support 3 theatres.

In that kind of a situation, it was eminently reasonable that Schine, having paid $22,500 for the Opera House in Lexington, and $5,000 for the lease of a property improved by nothing more than the partially erected walls of a building, should have taken from Schwartz a covenant not to compete. The covenant was for a period of 15 years and was to apply in any city or town in Kentucky in which Schine was then engaged in business (Ex. 828, R. 4362, 2051). The agreement provided that the covenant should not prevent Schwartz or his associates from investing in stock or securities listed upon any recognized stock exchange.

What could be more reasonable than for Schine to protect itself, in the other Kentucky towns where it was operating, against having to buy off Schwartz again?

**7. "Making long time franchise agreements covering the 'Circuit.'"**

This portion of Finding 8 is exemplified by the more specific Finding 16.

The term "franchise" has the same meaning in this case as in the *Paramount* case, where it was defined (66 F. Supp. at 833) as

> "A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of the agreement."

In connection with the 2-year postponement of trial during the war, appellants agreed to a provision in the consent order of May 19, 1942, that they would not enter into

"any franchise or other license agreement which shall license the exhibition of motion pictures released by any distributor during a period of more than one year" and to a further provision that all such agreements then in effect should be "void as to all motion pictures released after the thirtieth day following the entry of this order" (R. 260). Prior to that time, the consent decree in the *Paramount* case had prohibited the making of any further franchises by the 5 major distributors.

The Court in the *Paramount* case enjoined all franchises, saying (66 F. Supp. at 346-47):

> "Formula deals, certain master agreements, and franchises have tended to restrain trade in the distribution and exhibition of motion picture features and in view of the history and relation to the moving picture business of the various parties to this action have exercised unreasonable restraints. * * *
>
> * * * * * * *
>
> "Franchises which so far as the five major defendants are concerned were forbidden by the consent decree are also objectionable because they cover too long periods (more than one season) and also because they embrace all the pictures released by a given distributor. They necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder."

The plan to require distributors to license their individual pictures theatre by theatre was the means devised by the Statutory Court in the *Paramount* case for eliminating the practices of the distributor-exhibitors which the Court condemned as in violation of the Sherman Act; and of course franchise agreements, by which exhibitors might

buy all the pictures of a distributor for one or many theatres for a period of years, were entirely inconsistent with that plan, regardless of their propriety or impropriety as a method of licensing pictures. Adoption of such a plan necessarily required the voiding of franchises, as the Court pointed out.

**FINDING 16**

Finding 16 (R. 3220) relates to the period from 1936 to 1942. Because of its length it is printed in the margin.*

*"16. By reason of franchise agreements entered into prior to May 19, 1942 (voided thereafter, see Decree herein of that date) permitting special film rentals not given independents, 'Schine' was able to reap benefits unavailable to independents and these were utilized against independent operators as a means of restraint. These have a definite bearing on the competitive effect of buying power. Rather than make contracts for a single year, as appears to have been Schine's practice prior to 1936, he then began making such for a period of two or three years. These contracts included both the entire circuit and also those theatres for which Schine did the booking. The great buying power of 'Schine' enabled him to obtain concessions not obtainable by independents. In 1936 Schine made a three year agreement with Fox, and as a result he obtained the Fox feature product in all the towns which 'Schine' then operated and this agreement was later made to include subsequently acquired theatres. In 1938 a subsequent three year agreement was made. These agreements provided for payment of certain percentages of gross receipts after deduction of operating costs, and also fixed minimum admission charges. With Loew in 1936, a four year agreement was made under substantially the same terms as made with Fox. In 1937 a comparable three year agreement was made with Warner; in 1938 a similar one with RKO; a similar two year one with Columbia in the same year and a three year agreement was made with Universal in 1939. In the instance of United Artists, a distributing corporation, separate contracts were made for each feature for all Schine theatres. Another feature of these agreements was the inclusion of unfair and inequitable clearance provisions."

The history of the franchise method of licensing pictures is well summarized in the opinion in *United States* v. *Griffith Amusement Co., supra*, at 189-190, as follows:

> "As to the franchises, the evidence is that prior to the time covered by the complaint, the distributors conceived the idea of licensing their films for a longer period than one season. They sought out the exhibitors and endeavored to license them for a term of years, which resulted in contracts that were called franchises. They not only sought out the exhibitor operating a circuit of theatres, but also the exhibitor operating one theatre. Such licensing became a part of the ordinary method and many operators of theatres had franchises for a term of two, three, and even five years. Later most of the distributors concluded that in practical operation, a franchise was not desirable and discontinued the practice.
>
> "That such franchises were considered as a part of the ordinary method of contracting for moving picture films by all the trade is borne out by Section IV of the Consent Decree which provides: 'The provisions of this decree shall not apply to any franchise which was signed prior to June 6, 1940.'"

It will be noted that the Court below, in summarizing the Schine franchises, states that Schine "began making" franchise contracts in 1936, as if the making of such contracts were a unilateral matter, entirely within the determination and control of Schine. Actually the record shows that franchises were one of the several methods employed by the distributors in licensing pictures. The President of RKO testified at the trial and explained why the distributors offered franchises to theatre operators, as follows (R. 2869):

"Well, at the time we felt that a franchise would give us a continuous source of exhibition for our pictures in that particular theatre. It saved us the expense of going back and selling them each year. It gave us a sense of security in the production of our pictures. We knew we had an outlet."

Franchises were not a device thought up by Schine. They were an accepted method of doing business in the industry.* They were employed in distributors' contracts with the large distributor-affiliated chains, with independent chains and with operators of single theatres. The findings in the *Paramount* case show that 154 out of 213 franchises of Loew's were with "independent theatres"; that of 400 franchises of Fox in 1938-39, 361 were with "independent exhibitors"; and that 727 out of 770 Universal franchises were with "independent exhibitors" (70 F. Supp. at 63).

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*In the *Paramount* case, the origin of franchises was described as follows in the Court's Findings 4 and 5:

"4. In 1916 or 1917, a group of exhibitors which controlled many of the then best theatres throughout the country organized First National Exhibitors Circuit, Inc. Although this corporation was initially organized to function as a film buying combine, it evolved into a film producing company first by financing the production of pictures by others for exhibition in the theatres of its members and finally by producing its own motion pictures.

"5. The members of this First National group, consisting of many of the most important exhibitors in the United States controlling many of the best theatres, became franchise holders of the distributing company which they formed. They acquired not only the right to exhibit in their own theatres the pictures produced and distributed by First National, but also they each obtained the right to sub-franchise other exhibitors in their respective territories. In a short time there were some 3500 franchise holders, representing as many or more theatres.

A Fox division manager who testified at the trial stated that at least 150 out of some 200 Fox franchises were with single theatre operators (R. 2906).

In the lower Court the Government appeared to approve of franchises to individual theatres, for in its brief it said:

> "For an independent a franchise may be the means of protection against a loss of product which might otherwise occur when a powerful circuit enters his town. When made by a powerful circuit intent on absorbing competitors its effect is simply to solidify for a period of years such licensing discriminations as the circuit might otherwise have been able to incorporate in the customary annual deals" (Pl. Br. p. 44).

In other words, franchises are not bad *per se* but only if they "solidify for a period of years * * * licensing discriminations" which the Government considers in violation of the Sherman Act.

If the franchises were unlawful because they perpetuated previously existing unlawful practices, it would seem that, the franchises having been terminated in 1942, and the franchise method of doing business having been eliminated from the industry in the meantime, the issue of the franchises in this case would be academic. However, the Court's findings with respect to franchises were so exaggerated and so erroneous that its conclusions and the relief granted must have been influenced by a gross misapprehension of the evidence. It is for that reason that we think it necessary to analyze Finding 16.

As Finding 16 is in a somewhat jumbled order, it may facilitate discussion of it if we break it down into its constituent parts and put those parts into a logical order, as follows:

(1) Prior to May 19, 1942, to wit, in 1936, Schine, which had previously bought pictures for exhibition in its theatres year by year, began making franchise contracts with the distributors, *i.e.*, contracts for the purchase of pictures for two or more years.

(2) The first of those contracts was made with Fox in 1936. It was later amended to include subsequently acquired theatres; and it was renewed for 3 years in 1938.

(3) In 1936 a 4-year franchise agreement "under substantially the same terms" was made with Loew's.

(4) In 1936 a "comparable" 3-year agreement was made with Warner.

(5) In 1938, "similar" agreements were made with RKO and Columbia.

(6) In 1939 a "three year agreement" was made with Universal.

(7) The Fox franchise, and hence the one with Loew's on "substantially the same terms", the "comparable" and "similar" agreements with Warner, RKO and Columbia, and, presumably, the 3 year agreement with Universal

(a) covered "both the entire [Schine] circuit and also those theatres for which Schine did the booking", as well as "all towns in which Schine * * * operated" and all "subsequently acquired theatres".

(b) permitted "special film rentals not given independents" and provided for "concessions not obtainable by independents", but which Schine obtained because of its "great buying power";

(c) enabled Schine "to reap benefits unavailable to independents";

(d) provided for payment of certain percentages of gross receipts after deduction of operating costs;

(e) fixed minimum admission prices for the Schine theatres; and

(f) contained unfair and inequitable clearance provisions.

(8) The franchises have a definite bearing on the competitive effect of buying power.

(9) The franchises (or the "benefits" derived therefrom) were used against independent operators as a means of restraint.

(10) No franchise agreement was made with United Artists. Instead, "separate contracts were made for each [United Artists] feature for all Schine theatres".

The only exception that we take to paragraphs 1 to 6 of the above rearrangement of Finding 16 is that, as indicated in the analysis below, the various franchises were clearly not "on substantially the same terms", or entirely "comparable" or "similar". Each one varied in numerous respects from every other one.

Paragraph 8 above, to the effect that the franchises "have a definite bearing on the competitive effect of buying power" is an incomprehensible statement, and will not be referred to further.

The remaining paragraphs—7, 9 and 10—will be analyzed to show how far they depart from uncontrovertible evidence in the record.

In the first place, the Court found the franchises to be all-embracing—to cover *all* the pictures of the particular distributors for the *entire* circuit, and for *all* after-acquired theatres, as well as presently owned theatres, and for *all* theatres for which Schine did the booking.

Nothing could be further from the facts.

The franchise agreements took a number of forms. Two (Warner and Loew's)* were complete in themselves, and included a list of the theatres to which they were to apply, with the rentals and other terms for such theatres. Others were master agreements, stating certain terms and conditions that would apply to the pictures and theatres involved, but had to be supplemented by "deal sheets" for particular towns, by which the number of pictures, the rentals and some other terms and conditions would be fixed.** In no instance was the franchise the all-embracing contract which the Court found it to be.

Specifically, there was no franchise which included "the entire circuit". The first franchise, Fox for 1936-39, excluded 9 theatres which Schine was then operating. Nor was there any franchise which specifically included after-acquired theatres, or into which all after-acquired theatres were brought. Though the Court said that the first Fox franchise was amended to include after-acquired theatres, it was not so amended, and there were 30 theatres, acquired during the term of the franchise, which the franchise contract was not made to include, as well as 5 additional theatres for which the contracts, though incorporating the provisions of the franchise, were purchases of pictures for a single season.

The Fox franchise for 1939-42 excluded 16 theatres which Schine was operating at the date of the franchise,

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*Record references to the franchises are given in the long footnote *infra*.

**In the case of Paramount there was no master agreement or general franchise, but merely a standard form of license agreement, covering more than one season, which applied to particular towns, and which was separately executed for particular towns.

and there were 12 subsequently acquired theatres to which that franchise did not apply.*

The Loew's franchise, covering 1936-40, did not include 11 theatres operated by Schine on the date of the franchise. It did not include any after acquired theatres whatsoever.

The Warner franchise excluded 10 theatres which Schine was operating when the franchise was made, and 12 additional theatres, acquired during the term of the franchise, were likewise not included in it.

No Paramount franchise was obtained for 25 theatres that Schine was operating when the taking of Paramount franchises was commenced, and no Paramount franchises were obtained for 15 after-acquired theatres.

The RKO franchise excluded 13 theatres that Schine was operating when the franchise was made, and the franchise was not extended to 26 theatres acquired during the term of the franchise.

The Columbia franchise for 1938-40 excluded 18 theatres which Schine was then operating and 18 theatres acquired during the term of the franchise. The Columbia franchise for 1940-43 excluded 30 theatres which Schine was then operating and 5 theatres acquired during the franchise period.

The Universal franchise excluded 10 theatres that Schine was operating when the franchise was made and 15 theatres thereafter acquired.**

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*The theatres excluded from this and the other franchises are listed in the long footnote *infra*.

**Theatres operated by Schine on date of Fox franchise for 1936-1939 seasons (Exs. F-1 to F-55, F-57, F-59 to F-64, F-102 to F-110, F-112 to F-115, R. 4951, 5908-61, 5963-69, 4955-63, 4965-68, 2577-78) and not included therein: Rialto

Nor did the franchises include all pictures of the distributors. A glance at the first few of the Fox contracts (R. 5908 *et seq.*), made pursuant to the first of the fran-

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Theatre, East Rochester, N. Y.; Temple Theatre, Fairport, N. Y.; Pontiac Theatre, Ogdensburg, N. Y.; Strand Theatre, Bellefontaine, Ohio; Opera House Theatre, Kent, Ohio; Eckel Theatre, Syracuse, N. Y.; Keith Theatre, Syracuse, N. Y.; Paramount Theatre, Syracuse, N. Y.; Strand Theatre, Syracuse, N. Y. This franchise did not include the following theatres acquired by Schine during the term thereof: Moose Theatre, Norwalk, Ohio; Alhambra Theatre, Richmond, Ky.; Capitol Theatre, Ballston Spa, N. Y.; Southern Theatre, Bucyrus, Ohio; State Theatre, Mechanicsville, N. Y.; Castamba Theatre, Shelby, Ohio; Capitol Theatre, Whitehall, N. Y.; Ohio Theatre, Ashland, Ohio; Auburn Theatre, Auburn, N. Y.; Arcade Theatre, Cambridge, Md.; State Theatre, Cambridge, Md.; Kentucky Theatre, Corbin, Ky.; Hippodrome Theatre, Corbin, Ky.; Palace Theatre, Corning, N. Y.; Star Theatre, Delaware, Ohio; Music Hall Theatre, Easton, Md.; Avalon Theatre, Easton, Md.; Federal Theatre, Federalsburg, Md.; Ritz Theatre, Granville, N. Y.; Hurlock Theatre, Hurlock, Md.; Russell Theatre, Maysville, Ky.; Washington Theatre, Maysville, Ky.; Vernon Theatre, Mt. Vernon, Ohio; Arcade Theatre, Salisbury, Md.; Wico-Mico Theatre, Salisbury, Md.; Tiffin Theatre, Tiffin, Ohio; Wayne Theatre, Wooster, Ohio; Manring Theatre, Middlesboro, Ky.; Brownie Theatre, Middlesboro, Ky.; Plaza Theatre, Milford, Del.; Liberty Theatre, Pikeville, Ky.; Madison Theatre, Rochester, N. Y.; Monroe Theatre, Rochester, N. Y.; West End Theatre, Rochester, N. Y.; Marada Theatre, St. Michaels, Md.

Theatres operated by Schine at date of Fox franchise for 1939-1942 seasons (Exs. F-193, F-122, F-126 to F-171, F-173, F-174, F-176 to F-192, F-194 to F-203, F-205 to F-209, F-214, R. 4969, 1180, 6056, 2579, 6058-6103, 6105-06, 6108-24, 6125-34, 6136-40, 6145, 1180-82, 2579) and not included therein: Liberty Theatre, Rochester, N. Y.; Riviera Theatre, Rochester, N. Y.; Madison Theatre, Rochester, N. Y.; Monroe Theatre, Rochester, N. Y.; West End Theatre, Rochester, N. Y.; Eckel Theatre, Syracuse, N. Y.; Keith Theatre, Syracuse, N. Y.; Paramount Theatre, Syracuse, N. Y.; Strand Theatre, Syracuse, N. Y.; Strand Theatre, Bellefontaine, Ohio; Palace Theatre, Watertown, N. Y.; Ohio Theatre, Ashland, Ohio; Hurlock The-

chises, will show at once that the number of pictures bought depended upon the number required for the particular towns and theatres. Among those contracts there are two in

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atre, Hurlock, Md.; Arcade Theatre, Salisbury, Md.; Wico-Mico Theatre, Salisbury, Md.; Marada Theatre, St. Michaels, Md.

Theatres operated by Schine at date of Loew's franchise for 1936-1940 seasons (Ex. 618, R. 3952, 2524) and not included therein: Rialto Theatre, East Rochester, N. Y.; Hippodrome Theatre, Little Falls, N. Y.; Temple Theatre, Fairport, N. Y.; Pontiac Theatre, Ogdensburg, N. Y.; Strand Theatre, Bellefontaine, Ohio; Opera House Theatre, Wooster, Ohio; Rialto Theatre, Glens Falls, N. Y.; Eckel Theatre, Syracuse, N. Y.; Keith Theatre, Syracuse, N. Y.; Paramount Theatre, Syracuse, N. Y.; Strand Theatre, Syracuse, N. Y. Theatres acquired by Schine during term of this franchise and not included therein: Alhambra Theatre, Richmond, Ky.; Southern Theatre, Bucyrus, Ohio. State Theatre, Fostoria, Ohio; Kent Theatre, Kent, Ohio; Princess Theatre, Medina, Ohio; Castamba Theatre, Shelby, Ohio; Ohio Theatre, Ashland, Ohio; Auburn Theatre, Auburn, N. Y.; Arcade Theatre, Cambridge, Md.; State Theatre, Cambridge, Md.; Kentucky Theatre, Corbin, Ky.; Hippodrome Theatre, Corbin, Ky.; Star Theatre, Delaware, Ohio; Music Hall Theatre, Easton, Md.; Avalon Theatre, Easton, Md.; Federal Theatre, Federalsburg, Md.; Ritz Theatre, Granville, N. Y.; Hurlock Theatre, Hurlock, Md.; Russell Theatre, Maysville, Ky.; Vernon Theatre, Mt. Vernon, Ohio; Arcade Theatre, Salisbury, Md.; Wico-Mico Theatre, Salisbury, Md.; Tiffin Theatre, Tiffin, Ohio; Wayne Theatre, Wooster, Ohio; Opera House Theatre, Lexington, Ky.; Washington Theatre, Maysville, Ky.; Temple Theatre, Medina, Ohio; Manring Theatre, Middlesboro, Ky.; Brownie Theatre, Middlesboro, Ky.; Plaza Theatre, Milford, Del.; Paris Theatre, Paris, Ky.; Liberty Theatre, Pikeville, Ky.; Madison Theatre, Rochester, N. Y.; Monroe Theatre, Rochester, N. Y.; West End Theatre, Rochester, N. Y.; Marada Theatre, St. Michaels, Md.; Viv Theatre, Corbin, Ky.; Paramount Theatre, Glens Falls, N. Y.; Norwalk Theatre, Norwalk, Ohio; Palace Theatre, Syracuse, N. Y.; James Theatre, Syracuse, N. Y.

Theatres operated by Schine on date of Warner franchise for the 1937-1940 seasons (Ex. W-3, R. 4429, 1166) and not included therein: Rialto Theatre, East Rochester, N. Y.; Temple Theatre, Fairport, N. Y.; Strand Theatre, Bellefontaine, Ohio;

which Fox offered "all" and Schine bought "all"; several in which Fox offered either "all" or 56, and Schine bought from 40 to 49; and one instance where Fox offered only

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Ohio Theatre, Ashland, Ohio; Palace Theatre, Corning, N. Y.; Star Theatre, Delaware, Ohio; Eckel Theatre, Syracuse, N. Y.; Keith Theatre, Syracuse, N. Y.; Paramount Theatre, Syracuse, N. Y.; Strand Theatre, Syracuse, N. Y. Theatres acquired by Schine during term of this franchise and not included therein: Ritz Theatre, Granville, N. Y.; Wayne Theatre, Wooster, Ohio; Washington Theatre, Maysville, Ky.; Temple Theatre, Medina, Ohio; Plaza Theatre, Milford, Del.; Paris Theatre, Paris, Ky.; Liberty Theatre, St. Michaels, Md.; Viv Theatre, Corbin, Ky.; Paramount Theatre, Glens Falls, N. Y.; Palace Theatre, Syracuse, N. Y.; James Theatre, Syracuse, N. Y.

Theatres operated by Schine on date of Paramount franchise for 1939-1941 seasons (Exs. P-168 to P-194, P-197 to P-204, P-206 to P-238, PP-1 to PP-10, R. 5829-54, 5857-64, 5866-97, 5898-5907, 1170) and not included therein; Rialto Theatre, East Rochester, N. Y.; Riverside Theatre, Buffalo, N. Y.; Granada Theatre, Buffalo, N. Y.; Temple Theatre, Fairport, N. Y.; Eckel Theatre, Syracuse, N. Y.; Keith Theatre, Syracuse, N. Y.; Paramount Theatre, Syracuse, N. Y.; Strand Theatre, Syracuse, N. Y.; Regent Theatre, Amsterdam, N. Y.; Strand Theatre, Bellefontaine, Ohio; Rialto Theatre, Glens Falls, N. Y.; Empire Theatre, Glens Falls, N. Y.; Hippodrome Theatre, Little Falls, N. Y.; Lake Theatre, Rochester, N. Y.; Palace Theatre, Watertown, N. Y.; State Theatre, Mechanicsville, N. Y.; Ohio Theatre, Ashland, Ohio; Kentucky Theatre, Corbin, Ky.; Hippodrome Theatre, Corbin, Ky.; Federal Theatre, Federalsburg, Md.; Ritz Theatre, Granville, N. Y.; Arcade Theatre, Salisbury, Md.; Wico-Mico Theatre, Salisbury, Md.; Marada Theatre, St. Michaels, Md. Theatres acquired by Schine during term of this franchise and not included therein: Viv Theatre, Corbin, Ky.; Strand Theatre, Cumberland, Md.; Paramount Theatre, Glens Falls, N. Y.; Ada Meade Theatre, Lexington, Ky.; Norwalk Theatre, Norwalk, Ohio; Webster Theatre, Rochester, N. Y.; Ritz Theatre, Salisbury, Md.; Palace Theatre, Syracuse, N. Y.; James Theatre, Syracuse, N. Y.; Empire Theatre, Syracuse, N. Y.; Appalachian Theatre, Appalachia, Va.; State Theatre, Appalachia, Va.; Lyric Theatre, Bowling Green, Ohio; Cla-Zell Theatre, Bowling Green, Ohio; Palace Theatre, Clifton Springs, N. Y.; Oswego Theatre, Oswego, N. Y.

10 and Schine bought only 10. A glance at the first few pages of the deal sheets under the Universal franchise (R. 4725 *et seq.*) will show that the number of

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Theatres operated by Schine on date of RKO franchise for 1938-1941 seasons (Exs. R-37 (1-60), (62-66), (68-70), (72-76-A), (77-80), R. 4866-4924, 4926-30, 4932-34, 4936-40, 4942-45, 1187) and not included therein: Riverside Theatre, Buffalo, N. Y.; Granada Theatre, Buffalo, N. Y.; Pontiac Theatre, Ogdensburg, N. Y.; Strand Theatre, Auburn, N. Y.; Eckel Theatre, Syracuse, N. Y.; Keith Theatre, Syracuse, N. Y.; Paramount Theatre, Syracuse, N. Y.; Strand Theatre, Syracuse, N. Y.; Strand Theatre, Bellefontaine, Ohio; Strand Theatre, Van Wert, Ohio; Ohio Theatre, Ashland, Ohio; Auburn Theatre, Auburn, N. Y.; Star Theatre, Delaware, Ohio. Theatres acquired by Schine during term of this franchise and not included therein: Kentucky Theatre, Corbin, Ky.; Hippodrome Theatre, Corbin, Ky.; Viv Theatre, Corbin, Ky.; Washington Theatre, Maysville, Ky.; Temple Theatre, Medina, Ohio; Manring Theatre, Middlesboro, Ky.; Brownie Theatre, Middlesboro, Ky.; Plaza Theatre, Milford, Del.; Paris Theatre, Paris, Ky.; Marada Theatre, St. Michaels, Md.; Strand Theatre, Cumberland, Md.; Paramount Theatre, Glens Falls, N. Y.; Ada Meade Theatre, Lexington, Ky.; Norwalk Theatre, Norwalk, Ohio; Webster Theatre, Rochester, N. Y.; Ritz Theatre, Salisbury, Md.; Palace Theatre, Syracuse, N. Y.; James Theatre, Syracuse, N. Y.; Empire Theatre, Syracuse, N. Y.; Appalachian Theatre, Appalachia, Va.; State Theatre, Appalachia, Va.; Lyric theatre, Bowling Green, Ohio; Cla-Zell Theatre, Bowling Green, Ohio; Palace Theatre, Clifton Springs, N. Y.; Margie-Grand Theatre, Harlan, Ky.; Oswego Theatre, Oswego, N. Y.

Theatres operated by Schine on date of Columbia franchise for 1938-1940 seasons (Exs. C-100, C-101, C-102 (1-22), (24-48), (50-67), (72), (75), (78), R. 4971, 4973, 4975-96, 4999-5023, 5025-42, 5047, 5050, 5053, 1188-89) and not included therein: Fox Theatre, Corning, N. Y.; Rialto Theatre, East Rochester, N. Y.; Temple Theatre, Fairport, N. Y.; Massena Theatre, Massena, N. Y.; Pontiac Theatre, Ogdensburg, N. Y.; Eckel Theatre, Syracuse, N. Y.; Keith Theatre, Syracuse, N. Y.; Paramount Theatre, Syracuse, N. Y.; Strand Theatre, Syracuse, N. Y.; Strand Theatre, Bellefontaine, Ohio; Vine Theatre, Mt. Vernon, Ohio; State Theatre, Richmond, Ky.; Princess Theatre,

pictures covered for 5 towns were, respectively, 16, 20, 24, 26 and 36. The Paramount franchises were made town by town and the number of pictures varied according to the

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Medina, Ohio; Castamba Theatre, Shelby, Ohio; Ohio Theatre, Ashland, Ohio; Auburn Theatre, Auburn, N. Y.; Palace Theatre, Corning, N. Y.; Vernon Theatre, Mt. Vernon, Ohio. Theatres acquired by Schine during term of this franchise and not included therein: Ritz Theatre, Granville, N. Y.; Opera House Theatre, Lexington, Ky.; Washington Theatre, Maysville, Ky.; Temple Theatre, Medina, Ohio; Manring Theatre, Middlesboro, Ky.; Brownie Theatre, Middlesboro, Ky.; Paris Theatre, Paris, Ky.; Liberty Theatre, Pikeville, Ky.; Madison Theatre, Rochester, N. Y.; Monroe Theatre, Rochester, N. Y.; West End Theatre, Rochester, N. Y.; Marada Theatre, St. Michaels, Md.; Viv Theatre, Corbin, Ky.; Kentucky Theatre, Corbin, Ky.; Hippodrome Theatre, Corbin, Ky.; Paramount Theatre, Glens Falls, N. Y.; Palace Theatre, Syracuse, N. Y.; James Theatre, Syracuse, N. Y.

Theatres operated by Schine on date of Columbia franchise for 1940-1943 seasons (Exs. C-180, C-181 (1-33), (35-51), (53-79), R. 5057, 5061-93, 5095-5111, 5113-39, 1189-90) and not included therein: Colonia Theatre, Norwich, N. Y.; Palace Theatre, Auburn, N. Y.; Jefferson Theatre, Auburn, N. Y.; Auburn Theatre, Auburn, N. Y.; Massena Theatre, Massena, N. Y.; Eckel Theatre, Syracuse, N. Y.; Keith Theatre, Syracuse, N. Y.; Paramount Theatre, Syracuse, N. Y.; Strand Theatre, Syracuse, N. Y.; Regent Theatre, Amsterdam, N. Y.; Strand Theatre, Bellefontaine, Ohio; Wooster Theatre, Wooster, Ohio; Vine Theatre, Mt. Vernon, Ohio; Hippodrome Theatre, Little Falls, N. Y.; State Theatre, Richmond, Ky.; Palace Theatre, Watertown, N. Y.; Kent Theatre, Kent, Ohio; Princess Theatre, Medina, Ohio; Castamba Theatre, Shelby, Ohio; Ohio Theatre, Ashland, Ohio; Hurlock Theatre, Hurlock, Md.; Vernon Theatre, Mt. Vernon, Ohio; Wayne Theatre, Wooster, Ohio; Temple Theatre, Medina, Ohio; Liberty Theatre, Pikeville, Ky.; Marada Theatre, St. Michaels, Md.; Ada Meade Theatre, Lexington, Ky.; Ritz Theatre, Salisbury, Md.; Palace Theatre, Syracuse, N. Y.; James Theatre, Syracuse, N. Y. Theatres acquired by Schine during term of this franchise and not included therein: Lake Theatre, Canandaigua, N. Y.; Appalachian Theatre, Appalachia, Va.; State Theatre, Appalachia, Va.; Palace Theatre, Clifton Springs, N. Y.; Empire Theatre, Syracuse, N. Y.

requirements of the theatre or theatres in the towns involved (R. 5829 *et seq.*). Only under the Loew's and Warner franchises did Schine have the right to get all the distributor's pictures for the theatres to which those respective franchises applied.

One of the most misleading statements in Finding 16 is that the franchises, in addition to covering the "entire circuit" covered "also those theatres for which Schine did the booking". When the first franchise was entered into with Fox, Schine was not doing the booking for a single theatre outside of its circuit. That is to say, it was not booking any theatres that it did not operate or in which it did not have a financial interest of at least 50%.*

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Theatres operated by Schine on date of Universal franchise for 1939-1942 seasons (Exs. U-207, U-207 (1-50), (53-61), (63-89), R. 4724, 4725-74, 4777-85, 4787-4813, 1191) and not included therein: Strand Theatre, Bellefontaine, Ohio; Court Theatre, Athens, Ohio; Eckel Theatre, Syracuse, N. Y.; Keith Theatre, Syracuse, N. Y.; Strand Theatre, Syracuse, N. Y.; Moose Theatre, Norwalk, Ohio; Castamba Theatre, Shelby, Ohio; Ohio Theatre, Ashland, Ohio; Star Theatre, Delaware, Ohio. Theatres acquired by Schine during term of this franchise and not included therein: Lake Theatre, Canandaiuga, N. Y.; Liberty Theatre, Pikeville, Ky.; Viv Theatre, Corbin, Ky.; Strand Theatre, Cumberland, Md.; Paramount Theatre, Glens Falls, N. Y.; Ada Meade Theatre, Lexington, Ky.; Norwalk Theatre, Norwalk, Ohio; Ritz Theatre, Salisbury, Md.; James Theatre, Syracuse, N. Y.; Appalachian Theatre, Appalachia, Va.; State Theatre, Appalachia, Va.; Palace Theatre, Clifton Springs, N. Y.; Margie-Grand Theatre, Harlan, Ky.; Empire Theatre, Syracuse, N. Y.; Oswego Theatre, Oswego, N. Y.

*A misprint in the Answers to the Interrogatories (R. 246) which shows 1930 (instead of 1938) as the year in which Schine started booking for the Tiffin Theatre in Tiffin, O., would indicate that from 1930 until 1938, when Schine acquired a 50% interest, and took over the operation of, the Tiffin Theatre, Schine had a booking contract for that theatre. Actually, however, the commencement of booking was contemporaneous with acquisition of a 50% interest and the taking over of operating control.

The record makes clear that Schine has never been in the business of buying pictures for theatres other than those in which it had a financial interest and was operating. The only instances since the first franchise in which Schine had booked the pictures for theatres, outside of a summer resort theatre in Sacandaga Park in the Adirondacks, which it booked from 1937 on, were the following: 2 theatres in Bowling Green for about 2 years; one theatre in Pikeville and one in Harlan for less than one year, and single theatres in Appalachia and Big Stone Gap, Va., for 3 or 4 months: and in every case, except Bowling Green and the summer theatre in the Adirondacks, Schine undertook the booking in connection with a contract giving it an option to acquire an interest in the theatres involved.

Equally unsupported by the evidence is the statement that separate contracts were made for "each feature" of United Artists "for all Schine theatres". The record contains a number of United Artists contracts, but not one covering any feature for "all Schine theatres". For example, one United Artists picture was licensed to Schine in only 7 towns (Ex. 155, R. 5356, 2537), another in 14 towns (Ex. 127,* R. 2537); and another in 15 towns (Ex. 126, R. 5330, 2537). Two were licensed in 18 towns (Ex. 137,* R. 2537) and 17 in 21 towns (Exs. R. 5332, 5345, 2537; Exs. 139,* 143,* 144,* 147,* R. 2537).

With respect to the finding that the franchises permitted "special film rentals not given independents" and provided for "concessions not obtainable by independents", it is difficult to understand what the Court was referring to. In Finding 20 the Court went on to list the "special privi-

*These exhibits are not part of the printed record but, by stipulation, may be referred to (R. 3553).

leges" which Schine is supposed to have obtained from distributors; but, as was pointed out elsewhere, Finding 20 ends with the words: "These provisions were also in contracts with independents", which deprive the finding of any legal significance.

Finding 20 clearly covers the franchises, because it refers specifically to "the option of paying a percent of gross receipts from product or flat rental" (a provision of the Warner franchise) and to deducting from the gross receipts of theatres the cost of competitive devices (bank nights, etc.) "before computing the distributor's share" (a provision also found in the franchises). It must therefore be assumed that the special privileges that the Court is referring to in Finding 16 are those listed in Finding 20 (and so are privileges also accorded to competitors) plus the "privileges" mentioned in Finding 16, *i.e.*, the privilege of getting all the pictures for all of the theatres (discussed above) and the privilege referred to in the following sentence of Finding 16: "These agreements provided for payment of certain percentages of gross receipts after deduction of operating costs".

That finding is flatly contradicted by the terms of every franchise except that of Warner. There was no provision in any of the others which even referred to "operating costs". Only under the Warner franchise was it possible for operating costs to play a part in the determination of the license fees to be paid by Schine, and there was no proof that this was not a normal provision of all Warner franchises.

The particular provision in the Warner franchise was a complicated definition of a term used in percentage contracts, *viz.*, "35% (reversion to 30%) to Split if 35%"

(R. 4430-31). The definition fixed the point at which Warner's rentals would jump from 35% to 50% of the gross receipts, *i.e.*, it was a provision for increasing the rental to the distributor in the case of pictures that produced very large grosses. It is difficult to understand why the Court regarded such a provision as of any significance in the case.

The Government in its brief below, and the Court in its findings, seemed to proceed from the premise that all contracts for the rental of pictures—unless there is something abnormal or unlawful in the situation—are uniform in terms, and that any variation from such terms is a "special privilege" or "concession". Actually, there is no exact correspondence, with respect to *any* of the contract provisions, between any one Schine franchise and any other Schine franchise, or between any such franchise and other Schine rental contracts; and the record affords no basis for the assumption that any variation in terms between Schine contracts and other contracts must be assumed to be a concession "not obtainable by independents", or a benefit "unavailable to independents" or a "special privilege". The only basis that the Court had for such findings was the persistent assertion by the Government to that effect.

With respect to the finding that the franchises fixed minimum admission prices for the Schine theatres, it is to be noted that the Court did not find that Schine had violated the law by agreeing with the distributors on minimum admission prices. Moreover, as shown elsewhere, where minimum admission prices were fixed in contracts, they were ordinarily (if not always) lower than the actual admission prices of the Schine theatres involved. For that reason the Court could not have found, and it did not find,

that the fixing of minimum admission prices in such contracts had had the effect of creating a price structure for the Schine theatres or raising prices to the public.

Apart from that, this finding is also grossly inaccurate, since an examination of the franchises will show that no minimum admission prices were fixed in the original Fox franchise for 1936-39, or in the RKO franchise, the Universal franchise or the Columbia franchises. With respect to the Fox franchise for 1939-42, minimum admission prices were fixed for only a few of the theatres which that franchise covered.

With respect to the finding of the Court that the franchise provisions contain "unfair and inequitable clearance provisions", we have shown above that the Court's findings on specific clearances are without support in the evidence, and are contrary to the evidence. That being so, the sweeping generalization contained in Finding 16 must fail for indefiniteness and because it affirmatively appears that the Court failed to take into consideration any of the factors that have been held by the courts to be relevant in connection with the determination of reasonable clearance.

The only part of Finding 16 that remains to be discussed is the one that we have in the conclusion that the franchises "were used against independent operators as a means of restraint".

If this finding means that, a franchise having been made for a number of years, covering a particular run of product for a particular town in which there were competing theatres, the competing operators could not buy the same runs of the pictures in the same towns for the period of the franchise, then it is correct. As Government counsel pointed out (R. 493-94), the nature of the motion picture

business is such that every contract for the purchase of pictures by any operator in a competitive town restrains trade, in the sense that it limits the freedom of the distributor, who has sold a particular run of his pictures, to sell the same run to somebody else.

Whether that restraint of trade is unreasonable, however, is another question. The fact that the Court in the *Paramount* case held that, "In view of the history and relation to the moving picture business of the various parties to this action" (66 F. Supp. at 346), the use of franchises by the major distributors was a restraint of trade, does not require the conclusion that acceptance by exhibitors of franchises involved them in either (a) a purpose to restrain trade or (b) a restraint of trade in the particular situation.

It is submitted that neither the findings nor the evidence in the present case support the conclusion that Schine entered into franchises for the purpose of restraining trade unreasonably or attempting to monopolize, as distinguished from the competitive purpose of getting the pictures that Schine needed and wanted for its theatres.

Finding 16 is one of the many instances in which the Court's findings were so exaggerated, and so unjustified by the evidence, that the Court's acceptance of the statements in those findings must have strongly influenced his conclusions, both on the vital issue of motive and conspiracy and on the necessity or propriety of the drastic relief contained in the judgment and the order of divestiture.

**8. Other findings**

The findings that remain to be discussed are certain portions of No. 7 and two sentences from Finding 3, one

of which contains an ambiguity that needs to be pointed out and one of which is contrary to the evidence.

**FINDING 7**

Finding 7 (R. 3215) contains some statistics relating to the Schine Circuit; it refers to the "great film buying power" of Schine, its "opportunity to exert pressure on the distributors to obtain preferences," "the exceedingly large number of theatres" controlled by Schine,* "the large amount of money which must have been paid for film rentals,"** its ability to combine "open" and "closed" towns in buying pictures and thereby "to dictate terms to the distributors." Then it says: "This ability to dictate terms was further increased by the authority of Schine to buy product for theatres not owned or operated by it."

The sweeping generalizations of Finding 7, except for the sentence just quoted, can be supported only if the subsidiary findings on which they rest, Nos. 8 to 27, are sustained by substantial evidence. We have shown that they are not. With respect to the finding just quoted, about Schine's buying product for theatres not owned or operated by it, it is the simple fact that the finding is absolutely wrong. The fact is that Schine's "buying power" was not increased at all by "authority to buy product for theatres not owned or operated by it." The facts have been stated in the discussion of franchises, where it was shown that Schine was never in the business of buying pictures for

*I.e., about three-fourths of 1% of the theatres in operation in the United States.

**I.e., about 1% of the total domestic film rentals of Paramount, for example (R. 3137, para. 71 of motion to amend findings).

theatres in which it had no interest; that the only cases where it did so, outside of a summer theatre in the Adirondacks,* were instances where Schine had acquired an option to buy into the theatres, and that the periods while the booking arrangements were in effect were short (because Schine in those cases exercised its option and bought into the theatres).

A number of these theatres that Schine was booking for at any time was so small, and they were located in such small towns, that they could not have had more than an infinitesimal effect on Schine's "buying power".

**FINDING 3**

In the same connection it is necessary to note the following sentence in Finding 3, the ambiguous wording of which is apparently what led the Court into its error in Finding 7, and into the further error of including in the order of divestiture an injunction against the buying of pictures for theatres in which appellants were not financially interested:

> "In addition to its theatrical and realty operations, 'Schine' has booked and bought for and supervised 37 theatres since 1931, and when this suit was brought there were 27 for which it so acted."

This is an accurate statement, provided it is understood that in all such cases, except the trivial instances mentioned above, the theatres in question were theatres in which Schine had a financial interest and which it managed; but

*Before 1936, Schine's booking activities for others consisted of buying pictures for two theatres in the summer and winter resort of Lake Placid, New York.

the Court apparently forgot that fact, and concluded that Schine had increased its "buying power" by going into the business of buying pictures for other theatre operators—thus giving it control over the placing of large additional amounts of product.

Finding 3 contains another gross inaccuracy for which there is no supporting evidence, in the statement that

> "In 1941 there were only three towns in which Schine's competitors (hereinafter called independents) were playing major film product."

It has already been seen from Point III that there were no instances, where the subject of "deprivation of product" was concerned, in which Schine's competitors were *not* able to get "major film product" or were *not* playing "major film product". In some instances (Rochester and Buffalo) the competitors got the product on first run and Schine got it on second run. In other cases Schine got some product first run and the competitor got some product first run. In other instances, Schine got some product first run and the competitor got some product on second or some subsequent runs.

But in every case the competitor got product *on some run*—so that the Court's statement that competitors in only 3 towns were "playing major film product" in 1941 is contrary to the undisputed evidence.

## Conclusion

The errors in the Trial Court's findings are so substantial, they related to so many issues in the case, and they so clearly affected the Court's decision, that a reversal of the judgment is required under Judicial Code § 269 (28 U. S. C. § 391). *Kotteakos* v. *United States, supra.*

## Point IV

**THE INJUNCTIVE PROVISIONS OF THE JUDGMENT AND ORDER OF DIVESTITURE (a) VIOLATE SECTION 19 OF THE CLAYTON ACT AND RULE 65(d) OF THE RULES OF CIVIL PROCEDURE, (b) ARE INVALID FOR INDEFINITENESS AND (c) ARE IN EXCESS OF ANY APPROPRIATE REMEDY, IN ADDITION TO BEING UNWARRANTED BY THE FINDINGS BELOW OR BY THE EVIDENCE.**

The relevant assignments of error are Nos. 100 to 110 (R. 3499-02).

Section 19 of the Clayton Act (28 U. S. C. § 383) provides:

> "Every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, * * *"

The main provisions of the judgment below are drawn in utter disregard of the requirements of that statute and of Rule 65(d) of the Rules of Civil Procedure, which is in almost identical language.

Part I of the judgment, which purports to state "the reasons for the issuance" of the injunctions, is a 16-line declaration, substantially in statutory language and with no supporting detail whatever. Part II contains the injunctive provisions, in 7 paragraphs. We shall discuss them in order.

> *"1. From monopolizing the supply of major first run films in any situation where there is a competing theatre suitable for first run exhibition thereof*

*and from monopolizing the supply of second run film in any situation where there is a suitable theatre for second run exhibition thereof."*

This provision should be contrasted with those of the judgment in the *Paramount* case. There the Court arrived at a conclusion of law that the defendants had unreasonably restrained trade in the distribution and exhibition of motion pictures and had attempted to monopolize such trade, in two respects. Then, when it came to the judgment, the Court issued an injunction, not against "monopolizing" (which is a matter of law, not fact), but against specific practices of the kind by which, as the Court found, such monopolization had been attempted:

Injunction No. 1 is a broad prohibition in the language of the statute, is not directed at specific practices and its inclusion in the judgment was an abuse of discretion under the principles laid down many times by this Court. *Hartford-Empire Co.* v. *United States, supra* (320 U. S. 386); *National Labor Relations Board* v. *Express Pub. Co.*, 312 U. S. 426.

The injunction is also objectionable for indefiniteness, in view of the use of the ambiguous term "monopolize" (which in its findings the Court appears to have used in two senses*) and the use of the vague word "suitable" as a test to be applied to other theatres.

The difficulties of such words as "monopolize" and "suitable" can be avoided if the sound rule is followed that

*I.e., (a) the popular meaning—to possess the whole of something, and (b) the Sherman Act meaning, which, as understood by the framers of the statute, and applied from the beginning by the courts, is "the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." (Senator Hoar, 21 Cong. Rec. 3152).

injunctions should be restricted to the specific offenses which have been found to exist.

> "2. *From demanding or receiving clearances over theatres operated by others which unreasonably restricts their ability to compete with a theatre owned or operated by a defendant* [or a] *corporation controlled by it and from attempting to control the admission prices charged by others by agreement with distributors, demands made upon distributors, or by any means whatsoever.*"

The two subjects with which this injunction deals—unreasonable clearances and "attempting to control the admission prices charged by others"—will be dealt with separately.

**Clearance**

It has been shown under Point III that the Court's findings on clearances are either irrelevant or devoid of support in the evidence.

But even accepting the findings that Schine received unreasonable clearances, such findings still do not support an injunction against "clearance over theatres operated by others which unreasonably restricts their ability to compete" with Schine. For the proper test of the reasonableness of clearance is not what effect it has on the "ability" of another to compete, but whether it goes further (as to either period of time or area) than is necessary to serve its economic purpose, which is to give the prior-run exhibitor fair protection for his run. The point will be made clear by a comparison of Injunction No. 2 with the injunction that was granted in the *Paramount* case (70 F. Supp. at 73), where the defendants were restrained:

"4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted."

The Court in the *Paramount* case appreciated that clearance is a device for inducing the prior-run exhibitor to pay a high price for pictures, and so made the reasonable protection of that exhibitor the test of fair clearance. The Court below ignored the class of persons who buy and pay for clearance, and adopted a test of clearance which looks only to the economic interest of the class of persons over whom clearance is given—who, it is important to note, fall also within the first class when the question of clearance is between them and a subsequent-run theatre.

The situation may well exist, or may arise, where a marginal competitor would be able to compete successfully if there were no clearance, or if the clearance were very short, but where a normal period of clearance would make his operations unprofitable. The application of Injunction No. 2 to that type of situation is at least ambiguous.

The whole subject of clearance was tried out in the *Paramount* case. As shown under Point III, the Court below did not ever purport to try out that issue, but accepted the assertions of the Government that particular clearances shown in the contracts were unreasonable. In view of that fact, and for the sake of uniformity of decision, it is submitted that Injunction No. 2 should be modified to conform to the judgment in the *Paramount* case, and should read as follows:

"2. Demanding or receiving clearances over theatres operated by others in excess of what is reason-

ably necessary to protect the defendants in the runs licensed to them.* * *"

**Controlling admission prices of others**

The Court's findings of fact do not include a finding that Schine had controlled or attempted to control the admission prices of others. The injunction on that subject is based upon paragraph 4(h) of the Conclusions of Law which appear at the end of the findings (R. 3227). There, after repeating the "8 means and methods employed by" Schine "to obtain a 'monopolistic' control", as set forth in Finding 8, the Court added a 9th, to wit,

> "(h) Controlling the existence and extent of admission price differentials between Schine's and other competing theatres by agreement with distributors and by demanding that distributors refrain from licensing other theatres charging admission prices objectionable to Schine."

This "Conclusion of Law" is supported by no findings, and by no evidence, and it therefore must be disregarded. *Interstate Circuit, Inc.* v. *United States, supra.*

There is no evidence in the record that Schine ever demanded that distributors "refrain from licensing other theatres charging admission prices objectionable to Schine", except insofar as the situation in Bellefontaine in 1931, discussed above under Point III, Finding 9(a)—where Moller embarked on a trade war against the Schine theatre in that town—could be regarded as such evidence. And if it could be so regarded, this isolated instance in 1932 could hardly be the basis for such an injunction in 1944.

Nor is there any evidence that Schine had ever controlled, or attempted to control "the existence and extent

of admission price differentials between Schine's and other competing theatres by agreement with distributors". The only finding that has any conceivable bearing on the quoted portion of the Conclusion of Law 4(h) is 9(c), which reads (R. 3216):

> "(c) The license contracts with 'Schine' in many instances specified minimum admission prices for the various runs as well as clearance periods. This affects adversely the time given the competitor."

We stated under Point III that this finding is incomprehensible to us. That the making of license contracts which specify "minimum admission prices for the various runs, as well as clearance * * * adversely affects the time [presumably the playing dates for pictures] given the competitor" is a thought that entirely escapes us.

The first sentence of Finding 9(c) standing alone is understandable, and it seems to be the only basis for the Conclusion of Law about controlling admission prices, which is in turn the only basis for the second part of Injunction No. 2. What that sentence refers to is the expression of clearances in terms of admission prices, *e.g.*, 30 days over 25¢ houses, 40 days over 15¢ houses.

The sentence is wrong, because—while it is quite common in the industry to express clearances in terms of the admission prices of houses taking the subsequent runs—there are not "many instances" in the record of Schine contracts containing such a provision. But even if there were, the sentence would be quite irrelevant to the quoted conclusion of law, because (a) as held in the *Paramount* case, admission prices on successive runs are one of the important factors that enter into the determination of reasonable clearance (66 F. Supp., at 343), and (b) as found by the

Court in the *Paramount* case admission prices are one of the many "terms" in which clearance can be stated, as witnessed by that Court's listing of the various methods of stating clearance (66 F. Supp., at 341), where it said that clearance could be stated: "in terms of a given period between designated runs," or "in terms of admission prices charged by competing theatres, as, 20 days over 30¢ theatres, 28 days over 25¢ theatres," or "in terms of a given period of clearance over specifically named theatres", or "in terms of so many days' clearance over specified areas or towns", or "in terms of clearances as fixed by other distributors", or "in terms of combinations of these formulae".

There is nothing in Finding 9(c) to suggest that, in the few instances where Schine contracts contained clearances expressed in terms of admission prices, Schine had anything to do with fixing such prices, whether they were minimum or actual.

It should be noted that in that part of its opinion in which the Court states that "the license contracts with 'Schine' in many instances specified minimum admission prices for the various runs as well as clearance periods," the Court cites the *Interstate Circuit* case as clearly pointing to "the reasons for condemning such provisions in a film license contract or agreement" (R. 3076). But what was done by the defendant-exhibitors in the *Interstate Circuit* case—conditioning the buying of film upon the distributors' requiring competitors to charge certain minimum admission prices—was not done by Schine, and accordingly the Court committed serious error in holding the *Interstate Circuit* case to be a precedent on this point.

Finding 9(c) therefore gives no support to Conclusion of Law 4(h). Since there is no finding, and no evidence,

that Schine ever attempted to control the admission prices charged by others by agreement with distributors, demands upon distributors or any other means, there is no basis for the second part of paragraph 2 of the injunction, and it should be stricken from the judgment.

> *"3. From conditioning the licensing of films in any competitive situation outside of Buffalo, New York, upon the licensing of films in any other situation and from entering into any film franchises."*

The Court below did not find, nor was there any evidence, that Schine ever said to a distributor that it would not buy his pictures in other towns unless the distributor sold Schine its pictures for some particular town. There is a good deal of evidence (practically all inadmissible) to the effect that distributors, in explaining why they could not sell a particular run to a particular theatre, stated that they had sold it to the Schine theatre in the particular town and mentioned that Schine's business was important to them because he had a lot of theatres—a natural excuse and explanation to be given in such a situation.

There is also the finding of the Court that, "By combining the open and closed towns in Schine's deals with the distributors, Schine was enabled to dictate terms to the distributors" (a finding improbable on its face, as we have pointed out, and unsupported by evidence), and that Schine had great "buying power"; but it is submitted that those and like findings are not a sufficient basis for so broad an injunction as No. 3.

With respect to the matter of "film franchises", since all Schine's franchises were voided in 1942, and since the franchise method of selling has now disappeared from the

industry, no injunction would seem to be necessary. Nothing in the findings below even suggests that there is any probability or possibility that the distributors will re-establish the franchise method of selling. *Champion Spark Plug Co. v. Reich*, 121 F. (2d) 769, *cert. den.* 314 U. S. 669.

It will be noted that the Court excepted Buffalo from this particular injunction, a town with respect to which the Government had asked no relief and introduced no evidence. It is submitted that the Court should also have excepted all other towns for which there was no evidence.

*"4. From selling or acquiring any theatre interest pending further order of this Court."*

The prohibition against "selling" any theatre, including theatres in towns as to which there was no evidence, goes beyond any proper range of discretion of the Trial Court. There has been no "further order" lifting the prohibition against sales; and the stay pending appeal, contained in the divestiture order (R. 3467-68), is conditioned upon "the maintenance and operation by them [appellants] of the theatres here involved, pending such appeal, in a manner which will not prejudice the ultimate enforcement of this order." On their face these orders would seem to require that the integrity of the Circuit be maintained until final disposition of the appeal and any further proceedings in the case.

Thus the injunction against selling theatres appears to be based upon the premise on which the Government tried the case—that the whole proceeding is penal. Schine must hold its theatres together until the day when the Court's trustee can come in and sell them "as rapidly as possible" (R. 3466). The properties must be preserved intact for the judicial ax.

Perhaps it is not entirely clear that the injunction against selling, contained in the judgment, is still in effect; but if the Government considers that it is, then we ask the Court to annul that part of the judgment as unnecessary and improper.

With respect to the acquiring of theatres, Injunction No. 4 has been supplanted by the provisions of the order of July 5, 1946, which, in Part III, provides (R. 3467):

> "No defendant shall acquire a financial interest in any additional theatres except after an affirmative showing that such acquisition will not unreasonably restrain competition. Such showing shall be made before this court upon reasonable notice to the Attorney General at Washington, D. C. No defendant shall buy or book films for any theatre other than those in which the defendant owns a financial interest."

The Court did not find that acquisition of theatres by Schine in itself restrained or diminished competition. All that is inferable from the Court's findings is that, as Schine's "circuit buying power" was dependent upon the number of its theatres, the more theatres it acquired the greater the buying power would be. If the Sherman Act condemned "buying power", or provided a standard for determining when a further increase of "buying power" must be prevented, then there might be a basis for a flat prohibition against Schine's acquiring additional theatres; but it is difficult to see on what basis the acquisition of additional theatres can properly be made to depend upon a judicial hearing in each instance and an "affirmative showing that such acquisition will not unreasonably restrain competition" (R. 3467).

In the *Crescent* case this Court, at the instance of the Government, ordered the decree to be revised "so as to prohibit future acquisitions of a financial interest in additional theatres outside of Nashville 'except after an affirmative showing that such acquisition will not unreasonably restrain competition'" (323 U. S. 185-87).

Thus the order of divestiture in this case is modeled after the order in the *Crescent* case, differing only in that, while in the *Crescent* case the City of Nashville was excepted, no town in this case was excepted, not even Buffalo, which was excepted in the judgment, Part II, para. 3 (R. 3229).

In the *Crescent* case, in discussing the need for such a modification of the decree, the Court referred to the success of the defendants in the destruction or absorption of competitors and stated that "the decree should operate as an effective deterrent to the repetition of unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis", adding that, "The acquisition of a competing theatre terminates at once its competition" (323 U. S. at 186).

Since the defendants in the *Crescent* case had concentrated holdings of theatres in a geographical area, in which they had competition in only 5 of the 78 towns in which they had theatres, there was a special reason for the requirement that future acquisitions of theatres must be approved by the Court.

In the present case, where the theatre holdings are in scattered areas of 5 States, it seems inevitable that the prohibition of the final order would be "a barrier to healthy growth on a competitive basis", if only because of the necessity of transporting witnesses to Buffalo, from widely separated points, to testify in support of acquisitions.

Moreover, in view of the number of towns, especially one-theatre towns, in which Schine has provided the public with greatly improved theatre facilities, it would seem that the consideration of healthy competition would make it undesirable to put obstacles in its way.

Our position is that Part III of the final order is unnecessary, and should be eliminated. If not eliminated, then it should be confined to situations in which there might be a likelihood, or at least some possibility, that acquisitions would reduce competition, *i.e.*, it should be limited to acquisition of additional theatres in towns where Schine already has theatres and there are theatres of another operator or other operators.

Specifically,

(a) The injunction should not apply to Buffalo, just as the *Crescent* decree, as modified, did not apply to Nashville;

(b) For similar reasons it should not apply to any of the 44 towns for which the Government introduced no evidence;

(c) It should be confined to the general areas or the States in which Schine now operates, since there is no conceivable basis for a nation-wide—in fact a world-wide—injunction prohibiting appellants, or any of them, from acquiring any "financial interest in any additional theatres";

(d) The injunction should not be framed so as to deter Schine from building new theatres, either in towns where Schine operates or in additional towns, since otherwise the effect will be to remove from the theatre business a constructive competitive force, which has served in the

past to make great improvements in the public's facilities for entertainment;

(e) The injunction should not apply to any town where Schine has the only theatres, especially with reference to the building of new theatres by Schine;

(f) The injunction should not apply to the building of new theatres in any towns, whether or not there are other theatre operators in such towns, since Schine should not be deterred from improving the theatre facilities of any town by the building of a new theatre.

> "5. *From enforcing any existing agreements heretofore entered into (1) not to compete or (2) to restrict the use of any real estate to non-theatrical purposes.*"

As shown under Point III, the covenants not to compete, taken from individuals who sold theatres to Schine, were reasonable as to area and time and were sanctioned by the laws of the States where the properties were located.

With respect to the prohibition against restricting the use of any real estate to non-theatrical purposes, the Court made no finding relating in any respect to such an issue. Therefore, the injunction is without basis and must be stricken from the judgment.

Apart from those objections, it will be noted that Injunction No. 5 is not limited to the motion picture business. It prohibits the individual appellants, for example, from enforcing, against the owner of property abutting their residences, covenants restricting the property to residential purposes.

> *"6. From using any threats or deception as a means whereby a competitor is induced to sell."*

The Court made no finding on which to base an order against the use of "deception" as a means whereby a competitor is induced to sell.

Furthermore, while the Court found that Schine had made "threats" in a number of types of situations, there was no finding that the threats were "means whereby a competitor is induced to sell", and there is no instance cited in which the competitor was actually induced to sell by the alleged threats. As was shown under Point III, the alleged threats were surprisingly ineffective, because none of the "threatened" exhibitors actually sold out to Schine.

It is submitted that Injunction No. 6 is not justified by the evidence or the findings.

> *"7. From continuing any contract, conspiracy or combination with each other or with any other person which has the purpose or effect of maintaining the exhibition or theatre monopolies of the defendants or of preventing any other theatre or exhibitor from competing with the defendants or any of them, and from entering into any similar contract, conspiracy, or combination for the purpose or with the effect of restraining or monopolizing trade and commerce between the States."*

This is another broad prohibition against violating the Sherman Act and is invalid for the reasons pointed out above with respect to paragraph 1. It will be noted that the last part of paragraph 7 is not limited to the motion picture business, but broadly enjoins the defendants "from entering into any *similar* contract, conspiracy, or combination for the purpose or with the effect of restraining or monopolizing trade and commerce between the States."

It is submitted that the Trial Court failed in its judgment to meet the statutory requirements and the requirements of the Federal Rules, or to limit the relief to the kind of misconduct found. The decree modified by this Court in the *Hartford-Empire* case was criticized by the parties there as punitive, and as an outstanding example of reckless draftsmanship. It was a model of accuracy, conservatism and restraint in comparison with the decree in the present case.

The injunction contained in the order of divestiture provides (R. 3467):

> "No defendant shall buy or book films for any theatre other than those in which the defendant owns a financial interest."

Inasmuch as the defendants never bought or booked films for theatres in which they did not have a financial interest—as we have shown under Point III—except in several isolated cases where the amount of "buying power" derived from the booking arrangement was infinitesimal, this injunction has no relation to any issue in the case, and no basis in any of the evidence in the case.

Part IV of the order of divestiture should be stricken as beyond the authority of the Trial Court and a clear abuse of discretion.

Finally, the individual defendants should be eliminated from the injunctive provisions of the decree, inasmuch as no evidence was presented against them, and no finding made with respect to them, except in their capacities as officers or directors of the appellant corporation (see *Hartford-Empire Co.* v. *United States, supra,* 404-406).

## Conclusion

For the reasons stated herein it is respectfully submitted that the judgment of the Court below should be reversed.

WILLARD MCKAY,
*Attorney for Appellants.*

BRUCE BROMLEY,
ALFRED MCCORMACK,
RICHARD T. DAVIS,
*Of Counsel.*